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COURT OF APPEALS,  
DIVISION II  
OF THE STATE OF WASHINGTON

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KAIN KLAUDE KIRKENDOLL, Appellant

v.

KRISTIN ALENE KIRKENDOLL, Respondent

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BRIEF OF APPELLANT

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## I. INTRODUCTION

Appellant, Kain Kirkendoll (Kain), appeals the decision of the Thurston County Superior Court in the dissolution of his 27-year marriage with Kristin Peterson (fka Kristin Kirkendoll, hereinafter Kristin). Following trial, the Honorable Christopher Wickham entered a Decree of Dissolution, Findings of Fact and Conclusions of Law, Parenting Plan, Order of Child Support, and Child Support Worksheets, all of which are at issue.

Kain presents this appeal with the understanding that trial courts are afforded broad discretion in dissolution actions. That discretion, however, is not absolute or unfettered. To the contrary, the Washington Legislature has statutorily mandated at Chapter 26.09 RCW, that trial courts consider and be guided by certain factors that the Legislature deems necessary to make a fully informed and sound decision. A trial court abuses its discretion when it fails to consider and be guided by the expressly enumerated factors. Such an abuse of discretion has occurred in this dissolution.

This dissolution involves one minor child, Kaya, who, at the time of trial, had just turned 14. During an in camera interview, this young teenager expressed to the trial court that, other than when doing homework, she enjoyed spending time with her dad. But, while she enjoyed spending time with her dad, she did not want to be "forced" to see him under a set visitation

schedule. She told Judge Wickham "it would be enjoyable for me to go when I feel like I want to go visit my dad and hang out with my dad." 1RP 258

The trial court did not find that Kain's visitation with his daughter posed any danger. In fact, the trial court expressly found that the statutory factors that warrant restriction (RCW 26.09.191) do not apply. Nonetheless, the trial court ordered a parenting plan that severely reduced Kain's visitation rights. Year round, Kain is only entitled to see his daughter 7.5 hours, with no overnight stay, every other week. Any additional time during the school year, on holidays, or in the summer, is wholly subject to Kaya's approval. The trial court ordered this highly restrictive visitation schedule without consideration of the rights and wishes of Kain, and without basis. In so doing, the court has put Kain's relationship with his daughter in peril.

Central to the distribution of assets in this case was the value of Kain and Kristin's community-owned business, Washington Home Center (WHC). Despite the fact that the division of assets and maintenance award were supposedly founded upon the business value, the trial court never determined a value for the business. Though an expert valuation was presented, the trial court instead chose to apply a wild valuation range of \$100,000 to \$1.2 million to the business and used this range to make its decisions. This resulted in an exceptionally inequitable distribution of assets, and an onerous



and inappropriate maintenance award as part of that distribution, without consideration of the mandatory statutory factors.

The trial court also included \$72,813 of 2014 WHC business profit in Kain's income to determine his ability to pay \$6,368 monthly in combined maintenance, child support and court-ordered community debt payments, even though this profit did not yield disposable income, as it was used to pay capital contributions and taxes due and owing. This erroneous inclusion in Kain's income resulted in trial court orders that require Kain to make child support, maintenance, and community debt payments that exceed his actual net income, and create substantial economic disparity between Kain and Kristin.

The trial court abused its discretion when it made each of the above decisions as well as other decisions in this case. The trial court failed to consider and apply requisite statutory factors, failed to make necessary determinations and findings, failed to be guided by substantial evidence and, ultimately, entered dissolution orders that are highly inequitable to Kain. The trial court's orders should be reversed.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in substantially restricting the father's visitation with his minor daughter without a basis for restriction under RCW

26.09.191. Appellant thus assigns error to the Residential Schedule at Section III of the Parenting Plan, including subparagraphs 3.2, 3.3, 3.4, 3.5, 3.6 and 3.7, and Section 3.7 of the Decree of Dissolution.

2. The trial court erred in delegating to the child control and decision making for any additional visitation for the father with his minor daughter. Appellant thus assigns error to the Residential Schedule at Section III of the Parenting Plan, including subparagraphs 3.2, 3.3, 3.4, 3.5, 3.6 and 3.7, and Section 3.7 of the Decree of Dissolution.
3. The trial court erred in making a substantially disparate division of assets without legal basis, which are not supported by substantial evidence in the record. Appellant thus assigns error to the division of assets set forth at paragraph 3.2 of the Findings of Fact, Sections 3.2 and 3.3 of the Decree of Dissolution and Finding of Fact 2.8.

A. The trial court erred in failing to set forth the factors and methods used in accepting a business value range of \$100,000 to \$1.2 million, and in failing to make a finding regarding the value of the business; despite such failure the trial court stated at Finding 2.8 the business asset is "the largest asset held by the parties."

B. The trial court erred in finding that the value of the business ranged from \$100,000 to \$1.2 million (by adopting Trial Exhibit 22), which range is not supported by substantial evidence in the record, and further erred in applying such a broad range to divide the community assets.

C. The trial court erred in awarding "Funds taken from WHC" to Kain multiple times, where the funds were already part of the business valuation and where the funds consisted of business income previously spent for mandatory capital contributions and taxes.

D. Specific errors in the trial court's Finding of Fact 2.8 that are not supported by substantial evidence in the record include the trial court's findings that (i) only one expert concluded that the appropriate business value is \$100,000; (ii) the business asset is the single largest community property asset; (iii) appellant's expert's

valuation was based on the last five years business operations, which "were the worst five years for home sales since the Great Depression;" (iv) at the time of trial there was a marked improvement in sales in 2015 and the business is on target to yield profits in 2015 greater than in 2014; (v) valuation based on 2014 performance would yield a value of \$200,000; (vi) adopting Trial Exhibit 22 as correctly representing the value of the community assets and an equitable distribution of assets; and (vii) regardless of the valuation placed on the parties' business, the award results in significantly less assets being awarded to Kristin.

4. The trial court erred in ordering Appellant to pay maintenance based on his earning capacity, where Appellant's earning capacity is exclusively related to the goodwill already distributed, and without consideration of the statutory factors. Appellant thus assigns error to the maintenance award set forth at Section 3.7 of the Decree of Dissolution and Findings of Fact 2.8 and 2.12.

A. Specific errors in the trial court's Finding of Fact 2.8 that are not supported by the substantial evidence in the record include the trial court's findings that (i) Trial Exhibit 22 correctly represents valuation of the community assets, including that the value of the community business ranges from \$100,000 to \$1.2 million; (ii) regardless of the valuation placed on the parties' business, the award results in significantly less assets being awarded to Kristin; and (iii) the award of maintenance to Kristin is justified because of a disparate division of the assets resulting from awarding the business to Kain.

B. Specific errors in the trial court's Finding of Fact 2.12 that are not supported by the substantial evidence in the record include the trial court's findings that (i) Kain has the ability to pay and Kristin has a need; (ii) the court considered the statutory facts set forth in RCW 26.09.090; (iii) the only way to realistically compensate Kristin for her investment in the business and family home is to award Kristin substantial maintenance; (iv) the maintenance award still leaves Kristin with less income than Kain generated in 2014; and (v) the maintenance is necessary to make the division of the assets fair and equitable and to meet Kristin's needs.

5. The trial court erred in ordering Appellant to pay child support, debt, and maintenance payments which exceed his actual income. Appellant thus assigns error to the maintenance and spousal support awards set forth at Sections 3.7 and 3.12 of the Decree of Dissolution and Findings of Fact 2.8, 2.12 and 2.20 and Findings 3.2, 3.5 and 3.6 of Order of Child Support, together with the Child Support Worksheet. Appellant specifically assigns error to the trial court's inclusion in the support calculations net income reported on Kain's tax return that does not result in disposable income, but must necessarily be applied to mandatory capital contributions to sustain the business and payment of taxes.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court err in ordering a Parenting Plan that severely restricts the father's visitation with his minor daughter to only 7.5 hours every other week, where the trial court did not find that visitation posed danger to the child, and the trial court expressly found that there is no evidence to support restriction pursuant to the factors set forth in RCW 26.09.191?
2. Did the trial court err when it ceded full decision making authority and control for additional visitation with the father to his 14-year-old child?
3. Did the trial court abuse its discretion when it divided the community assets without determining the value of the community business, instead applying a wide and inexact valuation range, even though the trial court deemed the business the single largest community asset?
4. Did the trial court err when it treated income from the business as a separate, additional award to Kain, even though the trial court also awarded Kain the business with the income already included in the business valuation?
5. Did the trial court err in awarding maintenance that is not supported by the factors set forth in RCW 26.09.090 and is awarded to

distribute assets that were substantially overvalued and already distributed?

6. Did the trial court err in awarding child support based upon business income that does not yield disposable income to the paying father, but must be applied to ongoing mandatory capital contributions to continue the business and taxes?
7. Did the trial court abuse its discretion when it ordered maintenance and child support that creates a substantial economic disparity between the spouses and leaves one spouse with insufficient funds to pay even minimum living expenses?

#### **IV. PROCEDURAL HISTORY**

This dissolution was commenced on June 10, 2014 when Kain Kirkendoll filed the Petition for Dissolution. CP 7. Temporary orders, including a Temporary Parenting Plan, Temporary Order of Child Support and a Temporary Order addressing maintenance and debt payment, were entered on December 9, 2014. Appendices A-C.<sup>1</sup>

The dissolution was presented for trial on June 22 and 23, 2015. See 1RP. At issue were visitation issues, maintenance, child support, and division of property, which included a community-owned business.

The parties had largely agreed on a parenting plan at a pre-trial

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The Temporary Parenting Plan, Temporary Child Support Order, and Temporary Order are attached as Appendices A-C, respectively. These orders have been designated through a supplemental designation filed on November 9, 2015, clerk's page numbers have not been issued.

mediation, but Kain requested a modest increase in visitation at trial. 1RP 10. At trial, Kristin took the position that the child wanted less time with her father and the court interviewed the child in camera. 1RP 244. There was a dispute regarding the value of the business and Kain's disposable income (after business debt and taxes).

Immediately following trial, on June 23, 2015, the trial court issued its ruling regarding the parenting plan, effective immediately. 1RP 327-30. The remainder of the ruling was issued via Letter Opinion, which was filed July 2, 2015. CP 15. Following additional post-trial proceedings, the trial court entered Findings of Fact and Conclusions of Law (CP 81-98), a Final Parenting Plan (CP 99-107), a Final Order of Child Support (CP 108-21), and a Decree of Dissolution (CP 72-80). Kain timely filed a Notice of Appeal on July 27, 2015; and all of the final orders are at issue in this appeal. CP 70.

Because the issues, related facts and legal argument with respect to Kain's challenges to the Parenting Plan are wholly separate and discrete from those related to his challenges to the asset distribution and financial orders, this opening brief is structured slightly differently than a traditional opening brief. Kain has bifurcated his Statement of the Case and Arguments into two discrete sections. He presents one Statement of the Case that relates

exclusively to "Parenting Issues", it is immediately followed by the corresponding Argument on the "Parenting Issues". Thereafter, Kain presents a second, separate Statement of the Case related exclusively to "Financial Issues", immediately followed by the corresponding Argument on the Financial Issues.

#### **V. STATEMENT OF THE CASE - PARENTING ISSUES**

Kain and Kristin Kirkendoll met while attending college in 1985. They both dropped out without receiving a degree and married in 1987. In 1992, the parties' first child, a son, was born. He is already an adult and was completing college at the time of the dissolution. The parties also have a daughter, Kaya, born in May, 2001. 1RP 80-82. Kaya had just turned 14 at the time of trial. Both parents were active in the lives of their children. RP1 96-98.

During the dissolution action, Kristin maintained possession of the family home and Kaya lived primarily with her mother. But Kain remained actively involved in Kaya's life. Pursuant to the Temporary Parenting Plan, Kaya stayed with Kain one night every week, from Sunday 9:30 a.m. to Monday 7:00 p.m., and on Tuesdays from after school to 7:00 p.m. Holidays and special occasions were shared equally. Appendix A. Kristin expressed no concerns about this plan and sought no changes prior to trial. In fact, in a

pre-trial mediation, she agreed to continue the same plan. 1RP 127-28. Her attorney indicated at trial that Kristin thought parenting issues had been resolved with the Temporary Parenting Plan. 1RP 10.

At trial Kain requested a modest increase in time with his daughter. Again, under the Temporary Parenting Plan, Kain already had Kaya on Sundays during the day and overnight, plus Mondays and Tuesdays every week; Kaya returned to her mother for overnights on Mondays. The returns on Monday nights were disruptive and inconvenient, so Kain sought to add to his time, such that Sunday through Tuesday would be one uninterrupted block of time. He also asked for one month (one-third) of the summer break. 1RP 96-98. Kristin did not agree and, at trial, without prior notice, asked the court to meet with Kaya in camera. 1RP 237.

Kain did not want Kaya involved in the divorce proceeding, but the court met with Kaya over Kain's objection. 1RP 237. During the in camera interview, Kaya did not express any fears about spending time with Kain<sup>2</sup>. The only concern she expressed was that, when she did homework with her

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Remarkably, though Kristin never before requested any restrictions in the parenting plan, at trial she testified that she and Kaya had been very fearful of Kain and that they had changed the locks because Kain came to the house in December 2014, after he had moved out. She further testified that Kain drinks and has guns. 1RP 193-195. Despite these expressed fears, the parties had mutually agreed, as indicated above, on a standard parenting plan where Kain received one overnight and three days every week. 1RP 10, 127, 128. Based on her attorney's questioning at trial, it appeared as though Kristin's new concern and request for an in camera interview and less visitation were a retaliatory reaction to Kain's request for increased visitation. 1RP 127-129. Regardless, Kaya expressed none of the fears and concerns that Kristin belatedly asserted for the first time at trial and the trial court did not find that visitation with Kain posed any danger.



father, it made her "upset" and "nervous". 1RP 250. Kain confirmed Kaya's feelings in this regard and explained the tension. Kain testified that Kaya had been resistant, and had developed a "chip on her shoulder", with regard to doing homework. 1RP 97. Just prior to trial, Kaya had received two D-grades on her report card. 1RP 129. Kain testified: "I think with Kaya, it's always going to be a struggle, and she needs to have her toes held on the line with the homework, which is not happening." 1RP 98. Kain sought to create structure and discipline for Kaya's homework practices because he considered it his role as a father, even though he understood that Kaya, as a teenager, might be upset or look for ways to resist. Kain testified:

"I think at the age of 14, my daughter would like to take the path of least resistance, yes, and I think she would like to spend the time with her mom." 1RP 129.

Even with the tension surrounding homework, Kaya nonetheless informed the trial court that she enjoyed spending time with her dad. But like many teenagers, she did not want to be told when to do so. Kaya told Judge Wickham:

"I do enjoy going to visit my dad, but I don't enjoy it when I feel forced that I have to go see him. So it would be enjoyable for me to go when I feel like I want to go visit my dad and hang out with my dad." 1RP 258.

Unfortunately, rather than encourage Kaya to spend time with her dad, Judge Wickham encouraged Kaya's resistance. For example, almost

immediately after Kaya expressed that she did not want a schedule "forced" upon her, but before she expressed concerns about homework, Judge Wickham suggested to Kaya: "I'm not sure that going over during the school week is helpful for you." 1RP 250.

As another example, when discussing the weekend schedule, Judge Wickham asked Kaya if she wanted to go to her dad's on Saturday night, stay overnight and return to her mom Sunday evening. Kaya responded: "Saturday night, yeah that could work." 1RP 251. But Judge Wickham nonetheless suggested to Kaya, that since she will be in high school and will want to do things with her friends, she might want to eliminate the Saturday overnight. 1RP 252. Kaya followed his suggestion and said that it would be convenient for her mom to drop her off at church on Sunday morning to start Kaya's Sunday visit with her dad. 1RP 252-53. It was also Judge Wickham, not Kaya that suggested that Kaya's visits be limited to every other week. 1RP 251.

The following excerpt from the trial court's in camera interview provides the nature of the dialogue, 1RP 249-52:

Court: But the question is when would you like to see your dad.

Kaya: It's more enjoyable for me when I don t have to go see my dad, it's when I -- I want to go see him. I don t like being forced to go see him. . .

Court: . . . But I totally respect what you're saying, that you don't want to be forced to go over there when it's not where you want to be.

I don't think that helps him or you. Sometimes, particularly when parents have a hard time talking to each other and agreeing on things, which I think is true in your case right now, it's good to have a schedule so that your dad can set things aside and know that you're going to be there.

Kaya: Yeah.

Court: And you can plan accordingly. I'm not sure that going over during the school week is helpful for you.

Kaya: It's not.

Court: Now, your dad has complained about your homework, not getting it done.

Kaya: It's so hard to do it with him, because he makes me upset.

Court: Yeah, that sounds like - -

Kaya: and nervous.

Court: Sounds like it. Yeah. So it would be easier for you to do your homework at your mom's

Kaya: Much easier.

Court: So, in my mind, I guess that means not being at your dad's Sunday night, because Monday is a big day for school.

Kaya: It is.

Court: It's the beginning of the week. So let's assume that you weren't going to be at your dad's during the week, you'd be seeing him on the weekends. Your mom works on Sunday, is that right? And your dad has Sunday off?

Kaya: Yeah.

Court: But your dad probably works on Saturdays, I'm thinking?

Kaya: Yeah. And my mom doesn't work on Saturday.

Court: She does not. Okay. Would it make sense for you to go to your dad's on Sundays or every other Sunday or something like that?

Kaya: Every other Sunday, that sounds - - yeah.

Court: That's not unusual for that kind of schedule, and that allows you to stay in contact with him but not be over there at times that you don't want to be.

Kaya: I agree. It's much more enjoyable to go visit my father when I want to go see him and hang out with him.

Court: So if it were every other Sunday, would you feel good about that?

Kaya: Yeah.

Court: And would you want to go over for Saturday night and then stay and come back Sunday, say 6:00 o'clock or something? What would be good for you?

Kaya: Sunday night, yeah - - I mean, Saturday night, yeah, that could work.

Court: I'm just thinking, as you go forward in high school, you may want to do things with your friends, and that might involve Saturday.

At the conclusion of the trial, the trial court expressly found that the statutory bases for restricting visitation (RCW 26.09.191) do not apply in this case. CP 99-100. See also 1RP at 328-31. Nevertheless, the court radically restricted Kain's time with his young daughter. Judge Wickham completely abdicated the decision and acknowledged that he let Kaya set the schedule, announcing at the close of the trial:

"But at this point, my order would be that there be a school schedule, and then it be essentially what your daughter requested, which is that she go to her dad every other Sunday morning at St. Christopher's church, and then that she go back to her mom's the same day at 6:00. That she have the ability to talk to her dad and see if they can agree on something in addition to that, but, barring that, that would be the schedule going through the summer." 1RP 329.

The final Parenting Plan implemented that ruling and significantly reduced Kain's time with his daughter. Now, instead of weekly visits that span three days and include an overnight, his visits are limited to 7.5 hours every other week. CP 100-101. Kain's assured visitation totals only 15 hours per month, and includes no overnight visits and no extra time in the summer. Except for Father's Day, Kain is allowed no additional time – no holidays, special occasions or vacations – unless his 14-year-old child agrees. Control of Kain's visitation rights in this regard rests solely in the hands of the 14-year-old child. Id.

## **VI. ARGUMENT - PARENTING ISSUES**

### **A. The trial court erred in severely restricting visitation without a basis for restriction under RCW 26.09.191.**

A trial court's parenting plan is reviewed for an abuse of discretion, which "occurs when a decision is manifestly unreasonable or based on untenable grounds or untenable reasons." In re Marriage of Katare, 175 Wn.2d 23, 35, 283 P.3d 546 (2012). The trial court's findings of fact will be accepted if supported by substantial evidence. Id. "Substantial evidence" is

evidence sufficient to persuade a fair minded person of the truth of the matter asserted. *Id.*

While the trial court wields broad discretion in fashioning a parenting plan, the court's decision must be guided by Washington's Parenting Act. Katare, 175 Wn.2d at 552. Those Parenting Act provisions "include[e] the guidelines set forth in RCW 26.09.187(3), which must be read in conjunction with RCW 26.09.184 (setting forth the objectives and required contents of a permanent parenting plan), RCW 26.09.002 (stating the policy of the Parenting Act), and RCW 26.09.191 (setting forth limiting factors which require or permit restrictions upon a parent's actions or involvement with a child)." In re Marriage of Katare, 125 Wn. App. 813, 823-24, 105 P.3d 44 (2004), review denied, 155 Wn.2d 1005 (2005).

The legislature has expressed a policy that favors maintaining relationships between parent and child when setting a residential schedule. RCW 26.09.002 provides that "[t]he state recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests." Further, RCW 26.09.187(3)(a) provides that a court should make residential provisions for children that "encourage each parent to maintain a loving, stable, and

nurturing relationship with the child."

In light of the above policy directives, a court "may not impose limitations or restrictions in a parenting plan in the absence of express findings under RCW 26.09.191. ...any limitations or restrictions imposed must be reasonably calculated to address the identified harm." Katare, 125 Wn. App. at 826. Even if RCW 26.09.191 factors are implicated, "[i]mposing such restrictions "require[s] more than the normal ... hardships which predictably result from a dissolution of marriage." Katare, supra, 175 Wn.2d at 36, quoting In re Marriage of Littlefield, 133 Wash.2d 39, 55, 940 P.2d 1362 (1997).

In this case, there is no evidence of any potential harm or danger to Kaya from normal visitation or that any of the factors set forth in RCW 26.09.191 are implicated. To the contrary, the Final Parenting Plan explicitly states that RCW 26.09.191 does not apply. CP 99-100. Yet this Plan provides that, beyond a single day, every other week:

"Any additional time that Kain Kirkendoll has with Kaya shall be dependent upon the agreement the two of them reach, and shall be subject further to appropriate notice to the mother for planning purposes." CP 100.

This parenting plan is restrictive by any definition. It is significantly more restrictive than parenting plans ordered in cases with findings of extreme limiting factors such as drug abuse, domestic violence, and/or sexual

abuse. Even in those cases, before it imposes restrictions in a parenting plan, the trial court must perform the requisite analysis and find more than the normal hardships which predictably result from a marriage dissolution. The court may only impose restrictions where substantial evidence shows that a danger of damage exists. Katare, supra, 125 Wn.App. 813.

For example, in Katare, the trial court concluded there was no basis for finding that the factors in RCW 26.09.191 justified imposing restrictions. Despite this finding, the trial court imposed travel restrictions on the father. *Id.* at 816. The Court of Appeals remanded, holding that the court may not impose limitations or restrictions in a parenting plan in the absence of express findings under RCW 26.09.191. The Katare Court further directed, "any limitations or restrictions imposed must be reasonably calculated to address the identified harm." *Id.* at 826.

This Court has specifically indicated that one eight-hour unsupervised visit every two weeks is restrictive in In re Marriage of Watson, 132 Wn.App. 222, 229, 130 P.3d 915 (2006). In Watson, the father had been accused of sexually molesting his three-year-old daughter. Despite finding the accusation unfounded, the trial court left the father with only the one eight-hour unsupervised visit every two weeks. The Court of Appeals remanded and ordered the reinstatement of the non-restrictive plan which included standard



visitation rights, including alternating weekends, Thursday evenings, and holiday and summer residential time. Id. at 226, 239.

In the instant case, Kain's visitation rights have been restricted even more severely and there certainly have been no accusations in this case like those presented in Watson. The trial court made no finding of actual or potential harm, danger, or damage. Given that fact, the restrictions could not possibly be calculated to address any harm. The trial court clearly abused its discretion. As in Watson, this Court should find the restrictive plan imposed on Kain contrary to the law and to the substantial evidence in the record.

**B. The trial court erred in ordering a parenting plan in which the child's wishes control in the setting of the residential schedule.**

In this case there can be no earnest dispute that the trial court abdicated the decision on Kain's visitation rights to Kaya. Judge Wickham openly acknowledged that his parenting plan was "essentially what [Kaya] requested." 1RP 329. Kaya's desire to limit the visitation schedule with her father does not authorize the court to relinquish to Kaya its responsibility to determine the parenting plan and address future modifications.

When a child reaches an age of discretion, her wishes on the issue of custody may be considered, but are not controlling. Susnar v. Susnar, 45 Wn.2d 62, 64 273 P. 2d 237 (1954). See also Nelson v. Nelson, 43 Wn.2d 278, 279, 260 P. 2d 886 (1953). The factors set forth in RCW 26.09.191

remain central to a decision to restrict visitation. See Underwood v. Underwood, 181 Wn. App. 608, 612-13, 326 P.3d 793, 795 (2014). Again, the trial court expressly found that these statutory factors are not implicated in this case.

Washington courts have held that a trial court may cede to appropriate professionals its authority to determine a residential schedule in certain circumstances, but in no case has a court successfully turned its authority to determine a residential schedule over to a minor child. Permissible instances are limited to those involving the expertise of mental health professionals or guardians ad litem, but only as long as the court retains ultimate authority to review the decisions of the professional. Kirshenbaum v. Kirshenbaum, 84 Wn.App. 798, 807, 929 P.2d 1204 (1997).

The effect of expanding this rule to permit children who are the subject of the parenting plan to determine their own residential schedule would be catastrophic to families as well as the court system. Leaving the choice up to the children turns parenting into a popularity contest subject to the whims of the child, and removes the court's ultimate authority for determining what is in the child's best interest.

The Supreme Court's decision in In re Marriage of Rideout, 150 Wn.2d 337, 77 P.3d 1174 (2003), is instructive. There, the Court addressed

the question of whether a parent is responsible for a child's compliance with court-ordered residential time. In Rideout, the Court held:

"There are no doubt numerous instances where a child may not want to visit with his or her parent in accordance with a parenting plan or pursuant to a specific order of the court. Whether they like it or not, parents, like Sara, have an obligation to attempt to overcome the child's resistance to the residential time in order to ensure that a child's residential time with the other parent takes place. Sara had that responsibility and failed to meet it by not assuring that Caroline visited with her father in accordance with the parenting plan and the subsequent order of the trial court. In other words, she was obligated to make good faith efforts to require Caroline to do so. See RCW 26.09.160(1)." *Id.* at 356.

Here, it is the trial court itself that was presented with the responsibility for overcoming the child's resistance. However, instead of using its position to encourage contact with both parents, the court did the exact opposite. After a 15-minute interview, it encouraged the child's resistance to seeing her father and issued a permanent parenting plan based on the child's expressed wishes at a particular moment in time, and possibly as a result of her mother's influence.

The trial court in this case went far beyond considering the wishes of the child. It completely ceded its authority to determine the existing parenting plan, as well as its authority to make changes to the parenting plan in the future. It has ceded this authority, not to a mental health professional, guardian ad litem, or mediator, but to a 14-year-old child.

The severely restrictive Parenting Plan is not justified by the evidence and is contrary to the law. If the Final Parenting Plan is left in place this father-daughter relationship is at risk of irreparable harm. Parents have a fundamental liberty interest in the "care, custody and management of their children." In re Dependency of J.H., 117 Wn.2d 460, 473, 815 P.2d 1380 (1991); Underwood, 181 Wn. App. at 612. This Parenting Plan inexcusably denies Kain his liberty interest to the complete detriment of his relationship with his child.

#### **VII. STATEMENT OF THE CASE - FINANCIAL ISSUES**

After the parties left college in 1985, Kain worked at Les Schwab Tires. 1RP 80. Kristin began work in the manufactured home industry as a sales person. She worked for Washington Home Center (WHC) a dealer of manufactured homes. WHC earns profits from sales conducted via an inventory of on-site homes, or by operating as the middle-man for sales directly from the manufacturer. 1RP 12. Kristin testified that she was highly successful in this industry. 1RP 162. In fact, she was the top salesperson among all branches of WHC. 1RP 74, 291.

Eventually, Kain joined Kristin at WHC, also as a sales person. In 1997, both Kain and Kristin were promoted to sales managers of the company. They continued in these positions until 2007, when, at the height

of the real estate bubble, they purchased the business for \$1,200,000. 1RP 82

With the real estate market crash, the Kirkendolls were faced with declining sales and the business was in crisis. In 2010, the business nearly failed and the parties met with a bankruptcy attorney. 1RP 165-166. Kristin testified that both parties continued to run the business until 2012, when Kristin sought outside employment to supplement the family income. 1RP 165. Kristin currently works as a sales person at an athletic club. She testified she is the top salesperson in this position. 1RP 184.

The business purchase was a no cash transaction. Of the \$1,200,000 purchase price, \$66,000 was designated as goodwill in the contract, approximately \$100,000 was for fixed assets - such as staging furniture and office equipment - and more than \$1,000,000 was for the existing inventory of manufactured homes sitting on the business lot. 1RP 29.

The Kirkendolls purchased the business entirely with debt, using none of their personal funds. 1RP 70. The purchase consisted of assuming the existing inventory debt of \$782,000, and the creation of new debt (hereinafter, Note) to the previous owner in the amount of \$230,000. 1RP 83.

The purchase did not include the land upon which the business is conducted. Thus, the purchase agreement included a lease for the land. The lease required payments of \$10,000 per month. The Note to the previous

owner was to be paid at \$5,384 per month. 1RP 27.

In 2010, due to declining sales and the near failure of the business, the previous owner agreed to temporarily lower the lease portion of the combined lease and Note payments from \$15,384 to \$10,000, but to continue to give the Kirkendolls credit against the principal in the Note on the same schedule presented in the purchase and sale agreement. 1RP 27-28, 91, 165. The amount of principal on the Note paid each month changed slightly, but averaged \$4,000 per month during 2014. The remainder of the payment on the Note is approximately \$1,384, which is interest that is tax-deductible as a business expense, while the principal is not. 1RP 27-28.

The dissolution action was filed in June of 2014, and the reduced payment arrangement was still in effect through the pendency of the case. The previous owner has, however, indicated in writing that he wishes to reinstate the original combined lease and Note payments of \$15,384 as required by the 2007 purchase and sale agreement. 1RP 60, 91.

Eight months prior to trial, and prior to the October, 2014 settlement conference, Kain provided Kristin, through counsel, with an expert business valuation report, signed by two experts, Devon Brown and Cary Deaton. Exhibit 9. Their report valued the business at \$100,000. The valuation was updated in March 2015, with the same conclusion as to value. Exhibit 9. The

updated report was provided to Kristin. Kristin conducted no discovery in this regard, did not obtain a valuation that disputed the finding of the expert valuation, and did not call an expert to testify. 1RP 154.

At trial, Kristin presented Exhibit 22, which represented her proposed division of assets. 1RP 212-22; Exhibit 22. It included an award of the business to Kain at a value of \$100,000 to \$1.2 million. CP 97. This range came from Kristin's low and high views of the numbers: the \$100,000 value provided by the experts, and the 2007 purchase price of \$1.2 million. 1RP 223. However, the purchase price does not equate to value since it does not account for the significant debt undertaken to acquire inventory. 1RP 29-31.

The value of the business at the time of the purchase was the value of the goodwill at that time, \$66,000. 1RP 29-31. Nonetheless, over objection, the trial court adopted Kristin's Exhibit 22, in total, as the final property distribution, including its failure to appropriately value the business, instead setting the value at a range of \$100,000 to \$1.2 million. CP 16, 84, 96.

Kristin's Exhibit 22 also awarded \$72,813 to Kain described as "Funds taken from Washington Home Center". Exhibit 22, 3. That \$72,813 is the amount of profit listed on Kain's tax return. 2RP 29-31. It is only income from the viewpoint of federal tax law. In terms of cash available to the owner of the business, it is a fiction. 1RP 23. It consists of the principal

paid on the Note to the previous owner in 2014 (which is not a business expense under federal tax law and is, therefore, income) and the business taxes paid on that amount. 1RP 34. This amount, the 2014 profit, was also considered in the valuation of the business by the experts. 1RP 23-25, 33, 46. Again, while this amount is considered profit from the perspective of the I.R.S., the funds are not available for Kain's use because they are required to be used for mandatory payments on the Note and for taxes.

One of the two experts who signed the business valuation report, Devon Brown, testified at trial. The business valuation report was admitted without objection. Exhibit 9. Ms. Brown testified consistently with the report that the value of the business was \$100,000. 1RP 13, 19, 27, 29, 61, 64. On cross-examination, Ms. Brown was asked whether using the figures from 2014 alone, rather than the three year average she had used, would have yielded a higher valuation. She stated that, using 2014 alone, it could have been \$75,000 higher, but the value would not be as high as \$200,000 even using just 2014 numbers. 1RP 47. She testified that she still felt the appropriate value was \$100,000. 1RP 64. The court found that the report was based on the worst five years of home sales since the Great Depression (though it was based on a three year average, not five) and that the value was significantly greater than the \$100,000 valuation. CP 16.



The experts found that the value increased between 2007 and 2015 from \$66,000 to \$100,000. Exhibit 9, 1RP at 29. In essence, finding that the company had increased in value by \$34,000 since the date of purchase. The valuation was through the end of 2014, which included the taxable profit of \$72,813 (the additional amount also awarded to Kain under Exhibit 22. CP 97), and also considered the first few months of 2015. 1RP 60.

The trial court failed to make a specific finding of value for the business and did not indicate what method or factor, if any, it used in its determinations. CP 15-17, 82-84, Exhibit 22.

#### **VIII. ARGUMENT SUMMARY - FINANCIAL ISSUES**

There are two significant errors which permeated all of the trial court's financial rulings: 1) the valuation of the business; and 2) the calculation of Kain's income.

First, the trial court found that the value of the business was significantly more than the \$100,000 determined by the two experts (Ms. Brown and Mr. Deaton). Based upon this finding, it determined that Kain was receiving more than 50% of the assets under Kristin's proposal, and further determination of asset values was not necessary. CP 16. While a trial court is not required to accept any particular expert testimony, its findings must be based on substantial evidence. No evidence was offered to rebut the

testimony of the experts in this matter. Further, despite disagreeing with the expert opinions, the court failed to resolve the issue by finding an alternate valuation. CP 16. Instead, the court adopted Kristin's unilateral valuation from Exhibit 22, finding the business value to be \$100,000 to \$1.2 million.

The court also adopted Kristin's erroneous position that, even if it accepted Kain's business valuation of \$100,000, Kain was still receiving more assets.

COURT: Before you get too far along here, if I understand your Exhibit 22, if I were to use Ms. Brown's value of Washington Home Center, Mr. Kirkendoll still ends up with more value out of community property, less debt than does Ms. Kirkendoll, correct?

MR. POPE: Absolutely, Your Honor. 1RP 318.

This assessment, which may initially appear correct, is erroneous. Exhibit 22 shows Kain receiving \$271,499, while Kristin receives \$243,943 in assets, a difference of roughly \$28,000. Kain vehemently disagrees with this assessment, in part because it includes the fictional receipt of the \$72,813 taxable profit as an asset. But this was not the end of the property distribution. The court further awarded \$378,000 in maintenance to Kristin as part of that same property distribution. CP 16. Such an award, even using Kristin's Exhibit 22, skews the property distribution so far outside the realm of fairness that it leaves Kain with negative assets: (-\$106,501) and Kristin with more than 100 percent of the marital estate in the amount of \$621,943.

The court took the position that specific asset values were inconsequential, presumably because it felt the value of the business was large - *albeit unknown*.

THE COURT: Let me be clear. I thought that the respondent's valuation of property was reasonable. Certainly, there was some areas that could have been argued, but it seemed reasonable given the evidence. And the mathematical certainty of the values did not make a significant or substantial difference in the allocation of property in this case. And so it seemed to the Court that there could be a disagreement as to specific values, but that would not change the result. 2RP 26.

COURT: ... by adopting the exhibit [Exhibit 22], the Court essentially took care of all valuations. And I don't recall a significant issue re: valuations, and the Court did not attempt to equalize the value, and the Court accepted valuations that generally gave him more than 50 percent of the property. 3RP 25.

By adopting Exhibit 22, which included the business valuation as "\$100,000 to \$1.2 million," and adding \$378,000 in maintenance, the court has issued a wildly disparate property disbursement.

The second fundamental error regarding finances is the calculation of Kain's income. Per his 2014 federal tax return, Kain had gross income of \$149,293 (\$12,441 per month). Exhibit 19. The court used this amount in determining Kain could pay \$6,368 in child support, maintenance, and court-ordered community debt payments per month. CP 16. In reality, this is not the amount of income accessible by Kain. Kain's gross income is \$6,500 per month. His actual net income is \$4,934 per month. Exhibits 2, 5.

There was disputed testimony at trial regarding whether the payment of some incidental business expenses should be considered income to Kain. 1RP 121-127. Kain was told that the business valuation could be listed as a business expense and he paid the \$8,725 fee from the business account. 1RP 121. There was a false claim that Kain paid his attorney's fees from the business, when in fact they were paid on a personal credit card. 1RP 126-127. Other than this, all of the disputed expenses were commonly claimed business expenses such as cell phone, health insurance, and mileage reimbursement that had been claimed consistently since the purchase of the business in 2007. The expenses were approved by the parties' mutual accountant and were clearly paid out-of-pocket. Exhibit 19, 1RP 54-59. Importantly, the trial court did not find that any of the expenses were personal or inappropriately claimed, nor did the trial court include these items in the calculation of Kain's income. CP 15-17.

Kain receives a salary from WHC in the amount of \$78,000 per year. This is the income on his W-2. In 2014, the business also booked taxable profit of \$72,813. Exhibit 19. The taxable profit includes the roughly \$48,000 in principal paid on the Note because it is not deductible for federal income tax purposes. The payments on the Note are mandatory in order to retain ownership of the business. 1RP 22-23, 84. The payments on the Note are

considered profit under federal tax law because principal (as opposed to interest) payments are not deductible. The taxable profit is also taxed. After consideration of the tax on the profit, *none* of this income is available to Kain for his use or for the payment of child support or maintenance. 1RP 33-34.

The tax on the business profit of \$72,813 was more than \$24,000. Exhibit 19. Kain paid this tax *in addition* to his monthly deductions for personal income tax, FICA, and medicare, which totaled nearly \$18,000. Exhibit 19, Exhibit 2. The trial court used Kain's total taxable income of \$149,293 in determining his ability to pay maintenance, support, and debt, despite the fact none of the \$72,813 was available to him. CP 16, 1RP 33-34..

The trial court ordered maintenance in the amount of \$3,000 per month for 10.5 years, for a total of \$378,000 to "compensate Ms. Kirkendoll for her significant investment of time and energy in the business and family home". CP 16

## **IX. ARGUMENT - FINANCIAL ISSUES**

- A. The trial court erred in failing to set forth on the record which factors and method were used in valuing the business, and in failing to make a finding regarding the value of the business.**

As with the Parenting Plan, this Court reviews the trial court's distribution of assets for abuse of discretion. In re Marriage of Kraft, 119 Wn.2d 438, 450, 832 P.2d 871 (1992). Findings of fact are reviewed under

the substantial evidence test. Trans Canada Enters., Ltd. v. King Cy., 29 Wn. App. 267, 271, 628 P.2d 493, review denied, 96 Wn.2d 1002 (1981). Substantial evidence is evidence sufficient to persuade a fair minded person of the truth of the declared premise. Smith v. Shannon, 100 Wn.2d 26, 666 P.2d 351 (1983).

While the trial court is afforded substantial discretion, in a divorce, the trial court must use an accepted method to value a business and must also indicate which method was used. Marriage of Hall, 103 Wn.2d 236, 245, 692 P. 2d 175 (1984). In Hall, the trial court found that the husband's medical practice had goodwill valued at \$70,000. The only evidence supporting this finding was the wife's inexpert testimony. This finding conflicted with the only expert to testify in that case, who concluded there was no goodwill. The Supreme Court reversed and remanded, holding that the wife's unsubstantiated testimony and the records of the husband's earnings and tangible assets were insufficient without further analysis to persuade a fair minded person of the value. *Id* at 247.

As in Hall, the trial court in this was presented with expert testimony, as well as a report signed by two experts specifically detailing the valuation and the methods used. But unlike Hall, Kristin did not attempt to value the business in any way, so the court's finding was unsupported by even her

testimony. There was, in fact, no evidence offered to rebut the testimony of the expert. While the court found that the business was worth more than the expert's conclusion, it did not make a specific valuation finding.

A trial court is required to value property in a dissolution. "A court is not required to make findings in regard to every item of evidence introduced in a case, but it is necessary that it make findings of fact concerning all of the ultimate facts and material issues ... A material fact is one which a reasonable man would attach importance to in determining his course of action ... The valuation of property in a divorce case is a material fact." Wold v. Wold, 7 Wn.App. 872, 878, 503 P.2d 118 (1972).

The trial court is required to value the property so as to create a record for appellate review. In re Marriage of Hadley, 88 Wn.2d 649, 657, 565 P.2d 790 (1977). If the court fails to do so, the appellate court may look to the record to determine the value of the assets. *Id.* at 657. But if the values are in dispute, the court is unable to determine whether the property division is just and equitable and must remand to the trial court. In re Marriage of Greene, 97 Wn.App. 708, 712 986 P.2d 144 (1999).

The trial court in this case, despite having the report and testimony of two highly qualified experts, failed to state the factors or method it used to apply a valuation range of \$100,000 to \$1.2 million. The report and expert

testimony at trial provided detailed analysis of the methods and factors used in determining WHC's value. More importantly, a finding of \$100,000 to \$1.2 million is not a value, it is a range. A range, especially one of this magnitude, which exceeds the remainder of the marital estate by several multiples, provided no assistance at trial and certainly provides this Court no assistance in determining whether a fair and equitable decision was made.

WHC, while not the largest asset when valued properly, is certainly the most important (and contentious) in terms of the resolution of this case. Without a value for this asset, it is not possible to make a determination regarding a fair and equitable settlement. This inescapable fact has been borne out by the confused and patently unfair rulings of the trial court.

**B. The trial court erred in awarding "Funds taken from WHC" to Kain more than once.**

The trial court, in adopting Exhibit 22, awarded Kain \$72,813 as an asset. The exhibit calls this asset "Funds taken from WHC." It is referring to the taxable WHC profit taken directly from Kain's 2014 tax return. 1RP 216. The funds were spent on mandatory payments on the purchase Note (\$48,000) and business taxes (\$24,000). There was no dispute that both the payments on the Note and the taxes were made and were mandatory. 1RP 27-28, Exhibit 19. Therefore, the funds were not disposable income "taken" by Kain. Further, this taxable profit was included in the valuation of WHC,



which was awarded to Kain separately. 1RP 23-25, 33, 46.

Awarding property in a dissolution action to one party twice, although in different forms, is error. Marriage of Barnett, 63 Wn.App. 385, 388, 818 P. 2d 1382 (1991). In Barnett, the court ordered a lien of \$100,000 against the community property business, and awarded maintenance to the wife in an attempt to distribute her share of the business. "In effect, the same property was being distributed twice. This was error." Id.

The value of WHC was calculated considering, in part, the income from 2014. 1RP 23-25, 33, 46. That income, \$72,813, was spent entirely on mandatory payments on the purchase Note, and the requisite taxes. 1RP 33-34. Some of those funds reduced business debt and therefore increased equity. This fact was considered in determining the value of the business. 1RP 23-25, 33, 46. Here, the court is awarding Kain both the value of the business, \$100,000 to \$1.2 million, and the \$72,813 gross profit (already included in the value of the business), thus distributing the same property twice.

However, even without considering the fact the business was awarded to Kain, and ignoring the fact the funds were required for payment on the Note and taxes, both parties received the benefit of the remaining business income throughout the entire year of 2014, and through trial in June of 2015. The parties were still living together in June of 2014, CP 8, and from

June of 2014 through the date of trial in June of 2015, Kristin received the benefit of the business income because Kain paid the mortgage and other household expenses after moving out, and then paid the same expenses under a temporary order as maintenance. Appendix C. By the time of trial, all of the 2014 business income had been used on business expenses, mandatory capital contributions, taxes and the family, before and after separation. 1RP 33-34.

In ordering Kain to pay temporary maintenance using the 2014 business income, awarding the business to Kain, and awarding the 2014 business profit to Kain as a separate asset, the court awarded the same asset multiple times and abused its discretion.

**C. The trial court erred in making a disparate division of assets without a basis to do so.**

The trial court stated, with regard to its award of maintenance:

"The only way to realistically compensate the Respondent for her significant investment of time and energy in the business and family home is to award her substantial spousal maintenance . . . Maintenance should not terminate or be modified based on the Respondent's remarriage or cohabitation, because maintenance is also being utilized in this case to provide for a fair and equitable distribution of the assets and liabilities as well as to meet the needs of the respondent. For that reason, Kristin Kirkendoll should not be penalized nor should Kain Kirkendoll be financially rewarded, if the Respondent remarried or resided with another individual." CP 16

The maintenance award of \$378,000 alone exceeds the assets awarded

to Kain by more than \$106,000 (using the expert valuation of WHC at \$100,000). Both parties submitted trial exhibits valuing assets and proposing a distribution. The difference in values between the two exhibits was more than \$70,000. Recall that Kristin's Exhibit 22 includes as a separate asset the fictional \$72,813. Kristin also assigned many items high values and then proposed those items be given to Kain. The trial court adopted Kristin's proposal (Exhibit 22) in total, including her valuations, over Kain's objection.

A comparison of the assets awarded to both parties makes clear that the maintenance award results in a patent disparity in the economic circumstances of the parties. The maintenance award alone exceeds the value of all assets awarded to Kain by more than \$106,000, *even including the fictional \$72,813 in "Funds taken from WHC," and using Kristin's own disputed property valuations.*

The following comparison uses the exact values in Kristin's Exhibit 22, with the addition of the maintenance award.

	<u>Kain</u>	<u>Kristin</u>
Retirement Accounts	0.00	250,763
Business	100,000	0.00
Funds taken from WHC	72,813	0.00
All Other Assets:	121,153	23,341
Debt	(22,284)	(30,161)
Subtotal:	<u>271,499</u>	<u>243,943</u>
Maintenance:	-378,000	378,000
Total:	<u>-106,501</u>	<u>621,943 (114%)</u>

This is an extremely disparate division of assets. "In the absence of significant statutory factors or equities, we have held that community property should be divided more equally than one third to one party and two thirds to the other." Wills v. Wills, 50 Wn.2d 439, 441 312 P.2d 661 (1957).

Here, the trial court attempted to justify this wildly disparate division by refusing to value the business and adopting Kristin's Exhibit 22, which places the value of the business between "\$100,000 and \$1.2 million." But again, the substantial evidence in the record does not support use of this wide range.

The trial court made no finding under a statutory factor - or for any other reason - that a disparate division of assets was necessary or appropriate. Application of the statutory factors regarding distribution of property reveals that there is no basis for the disparate division in this case.

RCW 26.09.080 provides the following factors:

The court must consider:

1) The nature and extent of the community property

All of the property is community. An equal award of property to both parties would result in an award of nearly \$250,000 to each.

2) The nature and extent of the separate property

There is no significant separate property.

3) The duration of the marriage

The length of the marriage is 27 years. While this is a long marriage, this factor alone should not dictate that one party or the other should receive most of the property because standing alone it favors neither party.

4) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse with whom the children reside the majority of the time

The parties have the same earning capacity; both fully employed.

The court may also consider:

-The age and health of the parties

Kristin is three years younger than Kain; she has more time to work before retirement. Both parties are in good health.

-Their prospects for future earnings

The parties have the same earning capacity, the same experience, and the same education. Kristin testified at trial she could run the business better than Kain, but did not want the business. (1RP at 223). Kristin further testified that she was the top salesperson at her current place of employment. Expert testimony established that the business Kain is being awarded is at high risk for failure. 1RP 24-25. Kristin did not rebut this testimony.

-Their education and employment histories

The parties went to the same college and dropped out at the same time without degrees. They spent most of their careers not only in the same industry, not only in the same company within that industry, but in the same position within that company. Thus, any differences in background is negligible; the parties have almost exactly the same education and employment history. 1RP 80, 162-165.

-Their necessities and financial abilities

The parties have similar necessities and financial abilities, although there was disputed testimony that Kristin is living with another man who is sharing her expenses. 1RP 93. As mentioned above, Kristin is the top sales person in her current job and testified that she has the ability to run a business better than her husband.

-Their foreseeable future acquisitions and obligations

It is foreseeable, given her ability and experience, and the lack of barriers to entry in the manufactured home industry, that Kristin could start a competing business, and one without the crippling debt that puts Kain's business at such high risk.

It is also likely that the previous owner of WHC will demand the funds contractually owed to him and raise the combined lease and debt payments back to \$15,384 per month in the future.

-Whether the property to be divided should be attributed to the inheritance or efforts of one or the other, or both

The property to be divided is attributable to the efforts of both parties and should be divided equally.

Again, the trial court did not make any finding under RCW 26.09.080 - or on any other basis - that there should be a disparate division of assets. Appendix B, CP 16.

Because statutory factors justifying an extraordinarily disparate division of assets are not present, the trial court did not provide an apparent reason for the disparate division, and the division in the instant case is not just and equitable, a clear abuse of discretion has occurred.

**D. The trial court abused its discretion in ordering Kain to pay child support, debt, and maintenance payments which exceed his actual income.**

The court's erroneous determination of Kain's net income affected both child support and maintenance, and the combined monthly court-ordered payments leave Kain with negative income, while Kristin has net income of almost \$7,000 per month. "If a decree results in a patent disparity in the parties economic circumstances after a long-term marriage, a manifest abuse of discretion has occurred." In re Marriage of Rockwell, 141 Wn.App 235, 243, 170 P.3d 572 (2007).

The following facts are not in dispute:

Kristin's Income:

1. Kristin's net income from employment is \$3,210 per month (\$4,358 with child support).
2. Court-ordered maintenance of \$3,000 per month brings her net income after taxes to \$6,750.

Kain's Income

1. Kain's taxable income in 2014, on which the trial court rulings were based, was \$149,273.
2. Kain paid taxes in 2014 on business profit - above his monthly deductions - in the amount of \$24,097.
3. Kain was required to pay more than \$48,000 in 2014 toward the Note for the purchase of the business. This amount has been paid annually (in monthly payments) as required by the purchase contract since the business was purchased in 2007.
4. Kain paid the monthly deductions for his personal federal income tax, FICA, and medicare, which totaled nearly \$18,000 in 2014.

The above undisputed facts clearly establish that Kain's net income is \$4,934 per month. Nonetheless, the trial court ordered him to pay \$6,368 per month in combined maintenance, child support, and community debt.

Maintenance

In determining an award of maintenance, the trial court shall consider all relevant factors including, but not limited to, those enumerated in RCW 26.09.090. The standard of review for the appeal of a maintenance award is abuse of discretion. In re Marriage of Mathews, 70 Wn.App. 116, 123, 853 P.2d 462 (1993).



The Findings of Fact and Conclusions of Law drafted by Kristin's attorney and signed by the trial court significantly enhanced the court's Letter Opinion. CP 82-99, CP 15-17. The Letter Opinion, in providing the basis for the award, referred to maintenance as a set-off against property, discussed in Argument VIII, Section C, above. The Findings of Fact and Conclusions of Law included references to need and ability to pay and suggested that the maintenance statute would be applicable.

At the stay hearing on October 16, 2015, the trial court appeared to confirm this position and seemed to alter its prior findings:

MR. FINNEY: Because maintenance is monthly payments to cover property distribution. Maintenance in this case is not - - this Court's very specific ruling was that it is - -

THE COURT: Actually, you've misconstrued my comments. My point was that she is entitled to spousal maintenance. The comments about compensating her out of the business had to do with the duration, not the amount. It had to do with the length of maintenance, which is longer than the Court normally would have ordered, and that was a reflection on the fact that she was getting nothing out of the business. But at least for the initial months going forward, the spousal maintenance was based upon her need ... 3RP 7.

THE COURT: I just said that if you're looking at this as a property award, you've misunderstood the comments in my letter, and I apologize for mis-communicating. 3RP 8.

However, there was no analysis of the statutory factors by the court

regarding need and ability to pay.<sup>3</sup> But whether the original intent of the trial court has changed or not, an analysis under the statutory factors does not make the maintenance award more reasonable. To the contrary, under a need-based statutory analysis, the abuse of discretion is even more stark.

RCW 26.09.090 requires consideration of the following factors:

a) Financial resources of the party seeking maintenance

Kristin was awarded 100% of the parties' retirement and investment accounts. Without including the fictional "Funds taken from WHC," she received 55% of the assets (at her own valuation) before the maintenance award was added.

b) Time necessary to acquire education or training

Kristin testified that she was more qualified to run the community business and had more experience in the industry. The parties went to the same college and both dropped out without a degree at the same time. Shortly thereafter, they began working in the same industry, for the same company, in the same position, until they purchased the business and, according to Kristin, operated it together until 2012. Kristin does not need time to acquire

---

3

At the October 28, 2015 presentation hearing for the trial court's denial of the motion for stay, Kristin's attorney submitted seven new pages of findings. All of the findings related to the merits of the trial decision, many were contradictory of the original findings, and many of the new findings enhanced or modified the prior findings. Kain objected on the basis of RAP 7.2(e). Appendices D and E.

education or training, the parties have the *same* earning capacity.

c) Standard of living during marriage

Kristin is able to maintain a standard of living comparable to that enjoyed during the marriage using her income and child support alone. Her current income plus child support is within approximately \$100 of her first financial declaration signed October 31, 2014. Exhibit 6. At trial, Kristin filed a new financial declaration in which she claimed significantly increased expenses. Exhibit 20. Because her expenses are closer in time to separation and reflect continued residence in the family home, the expenses listed in her first declaration more closely resemble the standard of living during marriage.

d) Duration of the marriage

This is a 27-year marriage.

e) Age, physical and emotional condition

Kristin is three years younger than Kain; she has more time to work before retirement. Both parties are in good health.

f) Ability of the spouse from whom maintenance is sought to meet his or her needs

This factor was utterly ignored by the trial court. Kain cannot support himself while paying the ordered maintenance, while Kristin has more than enough to meet her needs without it.

Our facts are similar, but more severe and inequitable, than those in Marriage of Mathews, 70 Wn.App. 116, 853 P.2d 462 (1993). There, the court found abuse of discretion where the maintenance award left the obligor with \$1,000 per month and the obligee with \$1,855 per month. The Mathews court, in reversing the trial court's award of maintenance, further noted, "it appears Mr. Mathews does not have the 'ability ... to meet his needs and financial obligations ..., ' RCW 26.09.090(1)(f), while meeting the obligations imposed by the trial court." *Id.* at 123.

What is most glaringly missing from the trial court's analysis of maintenance is *any* consideration of Kain's needs under RCW 26.09.090(f) as noted above. "The needs of the obligor spouse, including the ability to meet his/her financial obligations, should be judged by the same standards that apply to the same subjects of the spouse who seeks maintenance. Certainly, the spouse being asked to pay maintenance should not be required to maintain a standard of living that is worse than the spouse who is to be receiving maintenance." (alteration in original) Weber, Washington Practice Volume 20, §34.9(3).

After meeting the obligations imposed on Kain by the trial court, considering the money available to him after mandatory deductions, Kain is left with a negative amount of income: -\$1,400. Even if Kain defaults on all

obligations imposed on him with the exception of maintenance and child support, he is left with only \$786 per month on which to live. Kain is not only being asked to maintain a standard of living far below that of Kristin, he is being asked to live on an income that is below the federal poverty guideline, is insufficient to provide stable housing and food, and is barely more than one-tenth of Kristin's net income after her receipt of maintenance and child support. By comparison, Kristin is enjoying a net income of nearly \$7,000 per month, in addition to receiving all of the liquid assets in the marital estate.

The trial court erroneously determined that Kain had the ability to pay these amounts due to the following finding:

In 2014 Kain Kirkendoll reported an adjusted gross income from the business of \$149,293. Although it is true that he invested a significant amount of this back into the business, it reflects the growth of the business coming out of the recession ... Ms. Kirkendoll, by way of contrast, had adjusted gross income of \$46,389. CP 16

When the trial court states that Kain invested a significant amount of the income back into the business, it is referring to the \$48,000 in payments on the purchase Note. The court did correctly indicate that these payments are capital contributions. The payments are also mandatory and continuing, and have been made monthly since the business was purchased by the parties in 2007. If the payments are not made, Kain will not own the business.

Normal business expenses are deductible to determine income. RCW

26.19.071 (5)(h). The deductibility under federal tax law does not control the trial court's decision. In re Marriage of Mull, 61 Wn.App. 715, 722, 812 P.2d 125 (1991). "We hold that when a parent is required to make *capital contributions* in order to maintain his or her source of income and when such contributions are not made to evade greater support obligations, those contributions qualify as 'normal business expenses' under Standard 4." Id. (emphasis ours). "In most instances the same resources that will be considered in setting child support will also be considered in maintenance cases." Weber, Washington Practice Volume 20 §34.9(2).

In addition to the capital contributions, the trial court also failed to consider the \$24,000 tax on the business profit of \$72,813 that Kain paid in addition to paying his own personal income tax. It is undisputed that Kain's adjusted gross income - for the purpose of federal tax law - is \$149,293. The income actually available to him is \$78,000, and that is before his personal taxes are deducted. There was no dispute that the \$48,000 in Note payments were made and were mandatory, nor was there a dispute regarding the liability for, and the actual payment of the \$24,000 in business taxes.

Whether the maintenance award is viewed as a property disbursement or is analyzed under the need-based statutory factors, the award creates such a devastating disparity in the economic circumstances of the parties, that an

abuse of discretion has clearly occurred.

#### Child Support

The trial court erred in setting child support using income which substantially exceeds Kain's actual monthly net income. As noted above, the mandatory capital contributions should not be included in Kain's income for the calculation of child support, Mull, supra. Kain's net income is \$4,934 and this should be the amount on which child support is based.

**E. The trial court erred in ordering Kain to pay maintenance based on his earning capacity where Kain's earning capacity is exclusively related to the goodwill already distributed.**

As noted above, the parties in this matter have virtually identical earning capacities. "Goodwill is a property or asset which usually supplements the earning capacity of another asset, a business or a profession. Goodwill is not the earning capacity itself, it is a distinct asset of a professional practice, not just a factor contributing to the value or earning capacity of the practice." Hall, supra at 241. The trial court in the case at bar may have confused earning capacity with goodwill. In its Letter Opinion, the court stated "The business, therefore, presents a significant potential income stream for Mr. Kirkendoll." CP 16.

Most cases involving the valuation of goodwill involve a professional practice in which the court is distinguishing the goodwill of the business from

the earning capacity of the professional based on the education, work experience, and professional license of the owner. In this matter, Kain does not have a professional degree. The parties have nearly identical earning capacity. Once the goodwill has been divided between the parties, making an additional maintenance award based on that same goodwill, without an associated advantage in earning capacity, is manifestly unfair. It also is a second award of the same asset and is error, as noted in Barnett, supra.

## **X. CONCLUSION**

The trial court abused its discretion in this dissolution by ordering an inappropriately restrictive Final Parenting Plan, a grossly inequitable division of assets, and child support, spousal maintenance and community debt that create such economic disparity that Kain is left with insufficient funds to pay minimum living expenses. This Court should reverse the trial court's orders in this regard and remand with appropriate instructions such that the final dissolution orders are consistent with the requirements of Chapter 26.09 RCW and the substantial evidence in the record.

Dated: December 10, 2015. Respectfully submitted,  
BROST LAW pc



By \_\_\_\_\_  
Randolph Finney, WSBA No. 19893  
Attorneys for Appellant Kain Kirkendoll



APPENDIX A

TEMPORARY PARENTING PLAN

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EMAIL@BROSTLAW.COM

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FILED  
SUPERIOR COURT  
THURSTON COUNTY, WA

2014 DEC -9 PM 1:50

BETTY J. GOULD, CLERK

SUPERIOR COURT  
STATE OF WASHINGTON  
COUNTY OF THURSTON  
FAMILY AND JUVENILE COURT

In re the Marriage of:

KAIN KLAUDE KIRKENDOLL,  
Petitioner,

and

KRISTIN ALENE KIRKENDOLL,  
Respondent.

NO. 14-3-00804-1

PARENTING PLAN - TEMPORARY  
(PPT)

The parenting plan is:

a temporary parenting plan signed by the court.

IT IS ORDERED, ADJUDGED and DECREED:

I. GENERAL INFORMATION

This parenting plan applies to the following children:

<u>Name</u>	<u>Age</u>
KAYA EMILY KIRKENDOLL	13

DCS

A-1

## II. BASIS FOR RESTRICTIONS

*Under certain circumstances, as outlined below, the court may limit or prohibit a parent's contact with the child and the right to make decisions for the child.*

### 2.1 PARENTAL CONDUCT (RCW 26.09.191(1), (2))

Does not apply.

### 2.2 OTHER FACTORS (RCW 26.09.191(3))

Does not apply.

## III. RESIDENTIAL SCHEDULE

*The residential schedule must set forth where the child shall reside each day of the year, including provisions for holidays, birthdays of family members, vacations, and other special occasions, and what contact the child shall have with each parent. Parents are encouraged to create a residential schedule that meets the developmental needs of the child and individual needs of their family. Paragraphs 3.1 through 3.9 are one way to write your residential schedule. If you do not use these paragraphs, write in your own schedule in Paragraph 3.13.*

### 3.1 SCHEDULE FOR CHILDREN UNDER SCHOOL AGE

There are no children under school age.

### 3.2 SCHOOL SCHEDULE

Upon enrollment in school, the child shall have the following schedule:

RESPONDENT/MOTHER: All times not specifically designated to the Father or as agreed by both parties.

PETITIONER/FATHER: Every Sunday 9:30 am to Monday at 7:00 pm; and one mid-week day (Tuesday) from after school to 7:00 pm (approximate ending time based on the Mother's work schedule). Additional time as agreed by both parties.

### 3.3 SCHEDULE FOR WINTER VACATION

Same as pre-school and/or school schedule. In addition, Wednesday from 5 - 7 pm.

### 3.4 SCHEDULE FOR OTHER SCHOOL BREAKS

Same as pre-school and/or school schedule. In addition, Wednesday from 5 - 7pm.

### 3.5 SUMMER SCHEDULE

Same as 3.3.

~~Each parent shall provide notice to the other parent by June 1st of their requested Summer Vacation dates. In the event of conflict, the Petitioner / Father's choice shall prevail in EVEN years, and the Respondent / Mother's choice shall control in ODD years.~~

### 3.6 VACATION WITH PARENTS

The schedule for vacation with parents is as follows:

~~Each parent shall have the opportunity for a two week uninterrupted vacation. Each party shall submit their requested dates by April 15 each year. In the event the parties cannot reach an agreement, the PETITIONER / FATHER'S dates shall prevail in EVEN numbered years; the RESPONDENT / MOTHER'S dates shall prevail in ODD numbered years.~~

### 3.7 SCHEDULE FOR HOLIDAYS

The residential schedule for the child for the holidays listed below is as follows:

<u>Holiday</u>	<u>With</u> <u>Petitioner</u> <u>/Father</u>	<u>With</u> <u>Respondent</u> <u>/Mother</u>
New Year's Day	EVEN	ODD
Martin Luther King Day	ODD	EVEN
President's Day	ODD	EVEN

<u>Holiday</u>	<u>With</u> <u>Petitioner</u> <u>/Father</u>	<u>With</u> <u>Respondent</u> <u>/Mother</u>
Memorial Day	EVEN	ODD
July 4th	EVEN	ODD
Labor Day	EVEN	ODD
Veteran's Day	ODD	EVEN
Thanksgiving (includes week-end)	<del>ODD</del>	<del>EVEN</del>
Christmas Eve	EVEN	ODD
Christmas Day	ODD	EVEN
Easter	EVEN	ODD

*Revised*  
*MB*  
*del*

For purposes of this parenting plan, a holiday shall begin and end as follows (set forth times):

Begin at 9:00 am and end at 7:00 pm.

Thanksgiving shall begin on Wednesday after school and end on Monday beginning of school.

Christmas Eve shall end at 11:00 pm.

Christmas Day shall end at 9:30 pm.

### 3.8 SCHEDULE FOR SPECIAL OCCASIONS

The residential schedule for the child for the following special occasions (for example, birthdays) is as follows:

<u>Special Occasion</u>	<u>With</u> <u>Petitioner/Father</u>	<u>With</u> <u>Respondent/Mother</u>
Mother's Day		EVERY
Father's Day	EVERY	

\*Child will spend birthdays with the parent who is having the birthday. (Kain (September 22; Kristin May 3).

### 3.9 PRIORITIES UNDER THE RESIDENTIAL SCHEDULE

Paragraphs 3.3-3.8, have priority over paragraphs 3.1 and 3.2, in the following order:

Rank the order of priority, with 1 being given the highest priority:

- |                                     |                                      |
|-------------------------------------|--------------------------------------|
| <u>7</u> school schedule (3.1, 3.2) | <u>2</u> vacation with parents (3.6) |
| <u>6</u> winter vacation (3.3)      | <u>3</u> holidays (3.7)              |
| <u>4</u> school breaks (3.4)        | <u>1</u> special occasions (3.8)     |
| <u>5</u> summer schedule (3.5)      |                                      |

### 3.10 RESTRICTIONS

Does not apply because there are no limiting factors in paragraphs 2.1 or 2.2.

### 3.11 TRANSPORTATION ARRANGEMENTS

Transportation costs are included in the Child Support Worksheets and/or the Order of Child Support and should not be included here.

Transportation arrangements for the child, between parents shall be as follows:

Transportation arrangements shall be shared equally between the parents. If the parties cannot agree otherwise, the receiving parent shall arrange for the transportation.

### 3.12 DESIGNATION OF CUSTODIAN

The child named in this parenting plan is scheduled to reside the majority of time with the RESPONDENT/MOTHER. This parent is designated the custodian of the child solely for purposes of all other state and federal statutes which require a designation or determination of custody. This designation shall not affect either parent's rights and responsibilities under this parenting plan.

### 3.13 OTHER

Does not apply.

### 3.14 SUMMARY OF RCW 26.09.430-.480, REGARDING RELOCATION OF A CHILD

This is a summary only. For the full text, please see RCW 26.09.430 through 26.09.480.

If the person with whom the child resides a majority of the time plans to move, that person shall give notice to every person entitled to court ordered time with the child.

If the move is outside the child's school district, the relocating person must give notice by personal service or by mail requiring a return receipt. This notice must be at least 60 days before the intended move. If the relocating person could not have known about the move in time to give 60 days' notice, that person must give notice within 5 days after learning of the move. The notice must contain the information required in RCW 26.09.440. See also form DRPSCU 07.0500, (Notice of Intended Relocation of A Child).

If the move is within the same school district, the relocating person must provide actual notice by any reasonable means. A person entitled to time with the child may not object to the move but may ask for modification under RCW 26.09.260.

Notice may be delayed for 21 days if the relocating person is entering a domestic violence shelter or is moving to avoid a clear, immediate and unreasonable risk to health and safety.

If information is protected under a court order or the address confidentiality program, it may be withheld from the notice.

A relocating person may ask the court to waive any notice requirements that may put the health and safety of a person or a child at risk.

Failure to give the required notice may be grounds for sanctions, including contempt.

If no objection is filed within 30 days after service of the notice of intended relocation, the relocation will be permitted and the proposed revised residential schedule may be confirmed.

A person entitled to time with a child under a court order can file an objection to the child's relocation whether or not he or she received proper notice.

An objection may be filed by using the mandatory pattern form WPF DRPSCU

07.0700, (Objection to Relocation/Petition for Modification of Custody Decree/Parenting Plan/Residential Schedule). The objection must be served on all persons entitled to time with the child.

The relocating person shall not move the child during the time for objection unless: (a) the delayed notice provisions apply; or (b) a court order allows the move.

If the objecting person schedules a hearing for a date within 15 days of timely service of the objection, the relocating person shall not move the child before the hearing unless there is a clear, immediate and unreasonable risk to the health or safety of a person or a child.

**Warning:** Violation of residential provisions of this order with actual knowledge of its terms is punishable by contempt of court and may be a criminal offense under RCW 9A.40.060(2) or RCW 9A.40.070(2). Violation of this order may subject a violator to arrest.

#### IV. DECISION MAKING

##### 4.1 DAY-TO-DAY DECISIONS

Each parent shall make decisions regarding the day-to-day care and control of each child while the child is residing with that parent. Regardless of the allocation of decision making in this parenting plan, either parent may make emergency decisions affecting the health or safety of the child. In the event of an emergency, the parent having the child shall make phone contact with the other parent.

##### 4.2 MAJOR DECISIONS

Major decisions regarding each child shall be made as follows:

Education decisions:	JOINT
Non-emergency health care:	JOINT
Religious upbringing:	* See Below

\* Each parent may include the child in their religious practice without interference from the other.



#### 4.3 RESTRICTIONS IN DECISION MAKING

Does not apply because there are no limiting factors in paragraphs 2.1 and 2.2 above.

#### V. DISPUTE RESOLUTION

*The purpose of this dispute resolution process is to resolve disagreements about carrying out this parenting plan. This dispute resolution process may, and under some local court rules or the provisions of this plan must, be used before filing a petition to modify the plan or a motion for contempt for failing to follow the plan.*

Disputes between the parties, other than child support disputes, shall be submitted to (list person or agency):

mediation by: THURSTON COUNTY DISPUTE RESOLUTION CENTER.

If this box is checked and issues of domestic violence or child abuse are present, then the court finds that the victim requested mediation, that mediation is appropriate and that the victim is permitted to have a supporting person present during the mediation proceedings.

The cost of this process shall be allocated between the parties as follows:

based on each party's proportional share of income from line 6 of the child support worksheets.

The dispute resolution process shall be commenced by notifying the other party by phone call.

In the dispute resolution process:

- (a) Preference shall be given to carrying out this Parenting Plan.
- (b) Unless an emergency exists, the parents shall use the designated process to resolve disputes relating to implementation of the plan, except those related to financial support.
- (c) A written record shall be prepared of any agreement reached in counseling or mediation and of each arbitration award and shall be provided to each party.
- (d) If the court finds that a parent has used or frustrated the dispute resolution process without good reason, the court shall award attorneys' fees and financial sanctions to the other parent.

- (e) The parties have the right of review from the dispute resolution process to the superior court.

## VI. OTHER PROVISIONS

There are the following other provisions:

### TELEPHONE CONTACT

A child shall be permitted to call a parent whenever reasonably desired. Neither parent shall monitor a child's call with the other parent.

Calls from a parent to a child shall be at reasonable times and for reasonable durations. If a child is not available when the nonresidential parent calls, the other parent shall ensure that the child returns the call before their regular bedtime that night.

### KNOWLEDGE OF AND PARTICIPATION IN EVENTS

A parent may participate in any school activity, such as: open house; athletic events; school dances; field trips; and the like. A child shall be accompanied by the parent with whom the child is residing at the time of the event. A parent shall not be restricted or limited from attendance, provided such attendance is not disruptive to the other participants.

Each parent shall be responsible for keeping himself or herself informed of any school, athletic and social event in which a child participates; however, when child is enrolled or signs up for an activity by a parent other than through the school, that parent shall inform the other of events, practices, etc., and notify the activity sponsor of the other parent's contact information.

Neither parent shall enroll a child in an activity that occurs during the residential time of the other without written agreement.

### ACCESS TO RECORDS / INFORMATION

A parent shall have complete access to a child's academic, medical, dental and extracurricular records pursuant to RCW 26.09.225. A parent shall have the right to confer with daycare, school, health and other care providers concerning the minor child. Neither parent may veto the other's right to access such personnel or information.

Each parent has the obligation to provide to the other the names, addresses, and contact information for any and all daycare, school, health, and other providers of services to the child.

#### DEROGATORY STATEMENTS / DISPARAGING ACTS

Each parent shall refrain from making derogatory statements or acting in a disparaging manner concerning the other, their lifestyle and/or associations, directly to a child, within their hearing, through third parties or otherwise (including posts on social media). Each parent agrees that such conduct is not in a child's best interest. Violation of this provision shall subject the violating party to contempt and the provisions of RCW 26.09.160.

#### DISCUSSING LITIGATION / GATHERING INFORMATION / MESSAGES

Each parent shall refrain from discussing this or any other litigation with (or within the hearing of) a child. Neither parent shall communicate the status of child support payments or other legal matters regarding their relationship to the child.

Neither parent shall use the child directly, or indirectly, to gather information about (or take messages to) the other.

#### CONTACT INFORMATION / CHANGE OF RESIDENCE / TRAVEL OUTSIDE THE STATE

Neither parent shall change the residence of any child without prior notification to the other parent. If a change of residence is intended to be permanent, the parent shall provide the nonresidential parent with notice as required by RCW 26.09.

If a parent intends to take any child out of the state for a scheduled vacation of 3 days or more duration, that parent shall notify the other parent in writing of the intended itinerary and telephone numbers where the vacationing parent can be reached.

#### ALTERNATIVE CARE

It is the responsibility of the parent scheduled to have residential time to arrange suitable alternative care if necessary.

#### NOTICE IF UNABLE TO EXERCISE REGULAR SCHEDULE

A parent shall notify the other parent at least forty-eight (48) hours in advance (except in the event of an emergency) if he or she is unable to exercise the regular schedule.

#### VARIANCE FROM SCHEDULED PARENTING PLAN

If a parent wishes to vary from the parenting plan, that parent shall appropriately communicate with the other. Only if there is an agreement regarding the variance shall the change be discussed with the child.

Neither parent shall ask the child to, or encourage the child to, ask the other parent for a variance in the parenting plan. Such plans and variances shall be first discussed between the parents, and if no agreement regarding such a variance is reached, then neither parent shall discuss this with the child.

An agreement to vary from the parenting plan once or several times, shall not be considered a permanent modification of the parenting plan. A modification of the parenting plan requires a written order signed by a judicial officer.

#### VII. DECLARATION FOR PROPOSED PARENTING PLAN

Does not apply.

#### VIII. ORDER BY THE COURT

It is ordered, adjudged and decreed that the parenting plan set forth above is adopted and approved as an order of this court.


**WARNING:** Violation of residential provisions of this order with actual knowledge of its terms is punishable by contempt of court and may be a criminal offence under RCW 9A.40.060(2) or 9A.40.070(2). Violation of this order may subject a violator to arrest.

When mutual decision making is designated but cannot be achieved, the parties shall make a good faith effort to resolve the issue through the dispute resolution process.

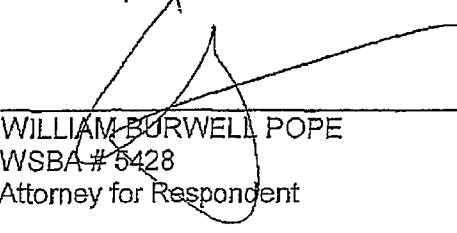
If a parent fails to comply with a provision of this plan, the other parent's obligations under the plan are not affected.

Dated 12/9/14  Judge/Commissioner  
JONATHON LACK

Presented by:

  
MARGARET BROST  
WSBA # 20188  
Attorney for Petitioner

Approved for entry:  
Notice of presentation waived:

  
\_\_\_\_\_  
WILLIAM BURWELL POPE  
WSBA # 5428  
Attorney for Respondent

\_\_\_\_\_  
KAIN KLAUDE KIRKENDOLL  
Petitioner

\_\_\_\_\_  
KRISTIN ALENE KIRKENDOLL  
Respondent

APPENDIX B

TEMPORARY ORDER OF CHILD SUPPORT

BROST LAW, PC  
1800 COOPER POINT ROAD SW #18  
OLYMPIA, WASHINGTON 98502  
EMAIL@BROSTLAW.COM

11  
FILED  
SUPERIOR COURT  
THURSTON COUNTY, WA

2014 DEC -9 PM 1:50

BETTY J. GOULD, CLERK

SUPERIOR COURT  
STATE OF WASHINGTON  
COUNTY OF THURSTON  
FAMILY AND JUVENILE COURT

In re the Marriage of:

KAIN KLAUDE KIRKENDOLL,  
Petitioner,

and

KRISTIN ALENE KIRKENDOLL,  
Respondent.

NO. 14-3-00804-1

ORDER OF CHILD SUPPORT  
TEMPORARY  
(TMORS)

Clerk's Action Required  
Law Enforcement Notification, ¶ 3.1

I. JUDGMENT SUMMARY

1.1 JUDGMENT SUMMARY FOR NON-MEDICAL EXPENSES

Does not apply.

1.2 JUDGMENT SUMMARY FOR MEDICAL SUPPORT

Does not apply.

II. BASIS

2.1 TYPE OF PROCEEDING

This order is entered under a petition for dissolution of marriage or domestic

ORDER OF CHILD SUPPORT (TMORS) - Page 1 of 11  
WFF DR 01.0500 Mandatory (6/2010) -  
RCW 26.09.175; 26.26.132  
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BROST LAW, PC  
1800 COOPER POINT ROAD SW #18  
OLYMPIA, WASHINGTON 98502  
360.357.0285

DCS

B1

partnership, legal separation, or declaration concerning validity:

hearing for temporary child support.

## 2.2 CHILD SUPPORT WORKSHEET

The child support worksheet which has been approved by the court is attached to this order and is incorporated by reference or has been initialed and filed separately and is incorporated by reference.

## 2.3 OTHER

Does not apply.

### III. FINDINGS AND ORDER

IT IS ORDERED that:

#### 3.1 CHILD(REN) FOR WHOM SUPPORT IS REQUIRED

<u>Name</u>	<u>Age</u>
Kaya Emily Kirkendoll	13

#### 3.2 PERSON PAYING SUPPORT (OBLIGOR)

Name:	KAIN KLAUDE KIRKENDOLL
Birth date:	See Confidential Information Form
Service Address:	3136 PEAR ST OLYMPIA, WA 98584

THE OBLIGOR PARENT MUST IMMEDIATELY FILE WITH THE COURT AND THE WASHINGTON STATE CHILD SUPPORT REGISTRY, AND UPDATE AS NECESSARY, THE CONFIDENTIAL INFORMATION FORM REQUIRED BY RCW 26.23.050.

THE OBLIGOR PARENT SHALL UPDATE THE INFORMATION REQUIRED BY PARAGRAPH 3.2 PROMPTLY AFTER ANY CHANGE IN THE INFORMATION. THE DUTY TO UPDATE THE INFORMATION CONTINUES AS LONG AS ANY MONTHLY SUPPORT REMAINS DUE OR ANY UNPAID SUPPORT DEBT REMAINS DUE UNDER THIS ORDER.



For purposes of this Order of Child Support, the support obligation is based upon the following income:

Actual Monthly Net Income: \$4,184.48

3.3 PERSON RECEIVING SUPPORT (OBLIGEE)

Name: KRISTIN ALENE KIRKENDOLL  
Birth date: See Confidential Information Form  
Service Address: 50 SE WINDSORCREST LANE  
SHELTON, WA 98584

THE OBLIGEE MUST IMMEDIATELY FILE WITH THE COURT AND THE WASHINGTON STATE CHILD SUPPORT REGISTRY AND UPDATE AS NECESSARY THE CONFIDENTIAL INFORMATION FORM REQUIRED BY RCW 26.23.050.

THE OBLIGEE SHALL UPDATE THE INFORMATION REQUIRED BY PARAGRAPH 3.3 PROMPTLY AFTER ANY CHANGE IN THE INFORMATION. THE DUTY TO UPDATE THE INFORMATION CONTINUES AS LONG AS ANY MONTHLY SUPPORT REMAINS DUE OR UNPAID SUPPORT DEBT REMAINS DUE UNDER THIS ORDER.

For purposes of this Order of Child Support, the support obligation is based upon the following income:

Actual Monthly Net Income: \$4,034.85

The obligor may be able to seek reimbursement for day care or special child rearing expenses not actually incurred. RCW 26.19.080.

3.4 SERVICE OF PROCESS

SERVICE OF PROCESS ON THE OBLIGOR AT THE ADDRESS REQUIRED BY PARAGRAPH 3.2 OR ANY UPDATED ADDRESS, OR ON THE OBLIGEE AT THE ADDRESS REQUIRED BY PARAGRAPH 3.3 OR ANY UPDATED ADDRESS, MAY BE ALLOWED OR ACCEPTED AS ADEQUATE IN ANY PROCEEDING TO ESTABLISH, ENFORCE OR MODIFY A CHILD SUPPORT ORDER BETWEEN THE PARTIES BY DELIVERY OF WRITTEN NOTICE TO THE OBLIGOR OR OBLIGEE AT THE LAST ADDRESS PROVIDED.

### 3.5 TRANSFER PAYMENT

The obligor parent shall pay the following amounts per month for the following child:

<u>Name</u>	<u>Amount</u>	<u>Effective 2/1/15</u>
Kaya Emily Kirkendoll	\$560.52	\$719.85
Total monthly transfer amount	\$560.52	\$719.85

MB  
WBL

Other:

Transfer payment may be used as off-set for payment of mortgage until the home is sold.

THE OBLIGOR PARENT'S PRIVILEGES TO OBTAIN OR MAINTAIN A LICENSE, CERTIFICATE, REGISTRATION, PERMIT, APPROVAL, OR OTHER SIMILAR DOCUMENT ISSUED BY A LICENSING ENTITY EVIDENCING ADMISSION TO OR GRANTING AUTHORITY TO ENGAGE IN A PROFESSION, OCCUPATION, BUSINESS, INDUSTRY, RECREATIONAL PURSUIT, OR THE OPERATION OF A MOTOR VEHICLE MAY BE DENIED OR MAY BE SUSPENDED IF THE OBLIGOR PARENT IS NOT IN COMPLIANCE WITH THIS SUPPORT ORDER AS PROVIDED IN CHAPTER 74.20A REVISED CODE OF WASHINGTON.

### 3.6 STANDARD CALCULATION

\$560.52 per month. (See Worksheet line 17); \$719.85 per month eff. 02/1/15.

### 3.7 REASONS FOR DEVIATION FROM STANDARD CALCULATION

The child support amount ordered in paragraph 3.5 does not deviate from the standard calculation.

### 3.8 REASONS WHY REQUEST FOR DEVIATION WAS DENIED

A deviation was not requested.

3.9 STARTING DATE AND DAY TO BE PAID

Starting Date: November 1, 2014; February 1, 2015  
Day(s) of the month support is due: 10th

3.10 INCREMENTAL PAYMENTS

Does not apply.

3.11 MAKING SUPPORT PAYMENTS

Select Enforcement and Collection, Payment Services Only, or Direct Payment:

*Direct Payment: Support payments shall be made directly to:*

KRISTIN KIRKENDOLL / OFF-SET TO MORTGAGE PAYMENT  
UNTIL HOME IS SOLD  
50 SE WINDSORCREST LANE  
SHELTON, WA 98584

A party required to make payments to the Washington State Support Registry will not receive credit for a payment made to any other party or entity. The obligor parent shall keep the registry informed whether he or she has access to health insurance coverage at reasonable cost and, if so, to provide the health insurance policy information.

Any time the Division of Child Support is providing support enforcement services under RCW 26.23.045, or if a party is applying for support enforcement services by signing the application form on the bottom of the support order, the receiving parent might be required to submit an accounting of how the support, including any cash medical support, is being spent to benefit the child.

3.12 WAGE WITHHOLDING ACTION

Withholding action may be taken against wages, earnings, assets, or benefits, and liens enforced against real and personal property under the child support statutes of this or any other state, without further notice to the obligor parent at any time after entry of this order unless an alternative provision is made below:

[If the court orders immediate wage withholding in a case where Division of Child Support does not provide support enforcement services, a mandatory wage

assignment under Chap. 26.18 RCW must be entered and support payments must be made to the Support Registry.]

Wage withholding, by notice of payroll deduction or other income withholding action under Chapter 26.18 RCW or Chapter 74.20A RCW, without further notice to the obligor, is delayed until a payment is past due, because:

the parties have reached a written agreement that the court approves that provides for an alternate arrangement.

### 3.13 TERMINATION OF SUPPORT

Support shall be paid:

provided that this is a temporary order, until a subsequent child support order is entered by this court.

### 3.14 POST SECONDARY EDUCATIONAL SUPPORT

The right to request post secondary support is reserved, provided that the right is exercised before support terminates as set forth in paragraph 3.13.

### 3.15 PAYMENT FOR EXPENSES NOT INCLUDED IN THE TRANSFER PAYMENT

The Respondent shall pay 48% and the Petitioner 52% each parent's proportional share of income from the Child Support Schedule Worksheet, line 6) of the following expenses incurred on behalf of the children listed in Paragraph 3.1:

extra-curricular expenses

Payments shall be made to the provider of the service.

### 3.16 PERIODIC ADJUSTMENT

Child support shall be adjusted periodically as follows:

Consistent with statutory and case law.

### 3.17 INCOME TAX EXEMPTIONS

Tax exemptions for the children shall be allocated as follows:

The Obligor shall have the right to claim the exemption in EVEN years and the Oblige shall have the right to claim the exemption in ODD numbered years.

The parents shall sign the federal income tax dependency exemption waiver.

### 3.18 MEDICAL SUPPORT - HEALTH INSURANCE

Each parent shall provide health insurance coverage for the child listed in paragraph 3.1, as follows:

3.18.1 Health Insurance (either check box A(1), or check box A(2) and complete sections B and C. *Section D applies in all cases.*)

A. Evidence:

(2) There is sufficient evidence for the court to determine which parent must provide coverage and which parent must contribute a sum certain. Fill in B and C below.

B. Findings about insurance:

The court makes the following findings:

PETITIONER	RESPONDENT	Check at least one of the following findings for each parent.
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Insurance coverage for the child is available <u>and</u> accessible to this parent at \$ <u>370.00</u> cost (child's portion of the premium, only)

C. Parties' obligations:

The court makes the following orders:

PETITIONER	RESPONDENT	Check at least one of the following options for each parent.
<input type="checkbox"/>	<input checked="" type="checkbox"/>	<p>This parent shall provide health insurance coverage for the child that is available through <b>employment or is union-related</b> even though the cost of such coverage <u>exceeds</u> 25% of this parent's basic support obligation. It is in the best interests of the child to provide such coverage despite the cost because:</p> <p>The cost for the health insurance is reimbursed by the business and is borne equally by the parties.</p>
<input checked="" type="checkbox"/>	<input type="checkbox"/>	<p>This parent shall be excused from the responsibility to provide health insurance coverage and from the responsibility to provide monthly payment towards the premium because: (only one parent may be excused)</p> <p>See Findings.</p>

D. Both parties' obligation:

If the child are receiving state financed medical coverage, the Division of Child Support may enforce the responsible parent's monthly premium.

The parent(s) shall maintain health insurance coverage, if available for the child listed in paragraph 3.1, until further order of the court or until health insurance is no longer available through the parents' employer or union and no conversion privileges exist to continue coverage following termination of employment.

A parent who is required under this order to provide health insurance coverage is liable for any covered health care costs for which that parent receives direct payment from an insurer.

A parent who is required under this order to provide health insurance coverage shall provide proof that such coverage is available or not available within 20 days of the entry of this order to the other parent or the Washington State Support Registry if the parent has been notified or ordered to make payments to the Washington State Support Registry.

If proof that health insurance coverage is available or not available is not provided within 20 days, the parent seeking enforcement or the Department of Social and Health Services may seek direct enforcement for the coverage through the other parent's employer or union without further notice to the other parent as provided under Chapter 26.18 RCW.

You may have separate obligations to provide health insurance coverage for the child(ren) under federal law.

### 3.18.2 Change of Circumstances and Enforcement

A parent required to provide health insurance coverage must notify both the Division of Child Support and the other parent when coverage terminates.

If the parents' circumstances change, or if the court has not specified how medical support shall be provided, the parents' medical support obligations will be enforced as provided in RCW 26.18.170. If a parent does not provide proof of accessible coverage for the child through private insurance, a parent may be required to satisfy his or her medical support obligation by doing one of the following, listed in order of priority:

- 1) Providing or maintaining health insurance coverage through the parent's basic support obligation;
- 2) Contributing the parent's proportionate share of a monthly premium being paid by the other parent for health insurance coverage for the child listed in paragraph 3.1 of this order, not to exceed 25% of the obligated parent's basic support obligation; or
- 3) Contributing the parent's proportionate share of a monthly premium paid by the state if the child receives state-financed medical coverage through DSHS under RCW 74.09 for which there is an assignment.

A parent seeking to enforce the obligation to provide health insurance

coverage may apply for support enforcement services from the Division of Child Support; file a motion for contempt (use form WPF DRPSCU 05.0100, Motion/Declaration for an Order to Show Cause re Contempt); or file a petition.

### 3.19 UNINSURED MEDICAL EXPENSES

Both parents have an obligation to pay their share of uninsured medical expenses.

The Petitioner shall pay 52% of uninsured medical expenses (unless stated otherwise, the Petitioner's proportional share of income from the Worksheet, line 6) and the Respondent shall pay 48% of uninsured medical expenses (unless stated otherwise, the Respondent's proportional share of income from the Worksheet, line 6).

MB  
WQ

### 3.20 BACK CHILD SUPPORT

Back child support that may be owed is not affected by this order.

Back interest that may be owed is not affected by this order.

### 3.21 PAST DUE UNPAID MEDICAL SUPPORT

Unpaid medical support that may be owed is not affected by this order.

Back interest that may be owed is not affected by this order.

### 3.22 OTHER UNPAID OBLIGATIONS

Other obligations that may be owed are not affected by this order.

Back interest that may be owed is not affected by this order.

Dated


12/9/14

Judge/Commissioner

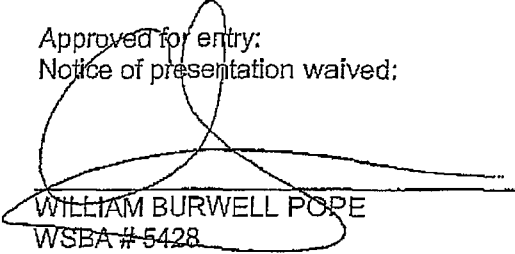
JONATHON LACK



Presented by:

  
\_\_\_\_\_  
MARGARET BROST  
WSBA # 20188  
Attorney for Petitioner

Approved for entry:  
Notice of presentation waived;

  
\_\_\_\_\_  
WILLIAM BURWELL POPE  
WSBA # 5428  
Attorney for Respondent

\_\_\_\_\_  
KAIN KLAUDE KIRKENDOLL  
Petitioner

\_\_\_\_\_  
KRISTIN ALENE KIRKENDOLL  
Respondent

APPENDIX C

TEMPORARY ORDER

BROST LAW, PC  
1800 COOPER POINT ROAD SW #18  
OLYMPIA, WASHINGTON 98502  
EMAIL@BROSTLAW.COM

FILED  
SUPERIOR COURT  
THURSTON COUNTY, WA

2014 DEC -9 PM 1:50

BETTY J. GOULD, CLERK

**SUPERIOR COURT  
STATE OF WASHINGTON  
COUNTY OF THURSTON  
FAMILY AND JUVENILE COURT**

In re the Marriage of:

KAIN KLAUDE KIRKENDOLL,  
Petitioner,

and

KRISTIN ALENE KIRKENDOLL,  
Respondent.

NO. 14-3-00804-1

TEMPORARY ORDER  
(TMO)

Clerk's Action Required  
Law Enforcement Notification, ¶ 3.1

**I. MONEY JUDGMENT SUMMARY**

Does not apply.

**II. BASIS**

A motion for a temporary order was presented to this court and the court finds reasonable cause to issue the order.

### III. ORDER

It is Ordered:

#### 3.1 RESTRAINING ORDER

BOTH PARTIES are restrained and enjoined from:

- ◆ Disturbing the peace of the other.
- ◆ Going onto the grounds of (EXCEPT: as necessary to exchange the minor child) or entering the home, <sup>residence</sup> ~~work place or school of the other.~~

#### 3.2 TEMPORARY RELIEF

DISPOSING OF PROPERTY: BOTH PARTIES are restrained and enjoined from transferring, removing, encumbering, concealing or in any way disposing of any property except in the usual course of business or for the necessities of life and requiring each party to notify the other of any extraordinary expenditures made after the order is issued.

INSURANCE POLICIES: BOTH PARTIES are restrained and enjoined from assigning, transferring, borrowing, lapsing, surrendering or changing entitlement of any insurance policies of either or both parties whether medical, health, life or auto insurance.

FUTURE DEBTS: Each party shall be immediately responsible for their own future debts whether incurred by credit card or loan, security interest or mortgage.

USE OF PROPERTY: The RESPONDENT shall have the use of the 2003 Dodge Ram titled in PETITIONER'S name. She shall not allow anyone else to drive the

vehicle. She shall be responsible for any costs associated with maintaining the vehicle, including payment of the insurance. *(but can be allocated at trial)*

PAYMENT OF CURRENT OBLIGATIONS: The parties shall pay the current obligations as follows:

<u>Debt/Obligation</u>	<u>Balance</u>	<u>Payment</u>	<u>Responsible Party</u>
Note (business)	\$180,000	*See Below	*See Below
Inventory (business)	\$240,000	*See Below	*See Below
BOA (Kain) #2417	\$13,300	\$133	Petitioner
Citi Mortgage (joint)	\$246,800	\$1,770	Respondent / See Child Support and Maintenance Below
Our Community CU (land)	\$37,011	\$536	Petitioner / **See Below
BOA (Kain) #2417	\$13,300	\$133	Petitioner
BOA (Kristin) #71	\$9,233	\$127	Respondent
Chase (Kristin)#8411	\$14,785	\$356	Respondent
BOA (joint) #7245	\$9,200	\$250	Petitioner
Alaska Airlines (Kain) #5674	\$2,300	\$25	Petitioner
Cabelas #8314 (Kain)	\$4,600	\$50	Petitioner

\* Paid from the business.

\*\* Any issues related to the marital off-set to the value of the property is reserved for settlement and/or trial.

*Resp shall pay car insurance & cell phones for family.*

TEMPORARY PARENTING PLAN: The parties shall comply with the Temporary

Parenting Plan, signed by the court.

CHILD SUPPORT: Child support shall be paid in accordance with the Order of

Child Support, signed by the court. The child support payment may be made toward the mortgage payment.

MAINTENANCE: KAIN KIRKENDOLL shall pay the other party \$1,000 per month maintenance. The start date shall be November 1, 2014. The maintenance payment may be made toward the mortgage payment. He shall have credit for any amounts paid in excess of his obligation.

3.3 BOND OR SECURITY

Does not apply.

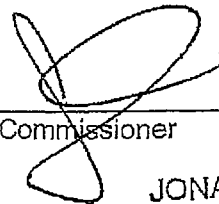
3.4 OTHER

- a. Both parties shall be named on any new business bank account related to Kirkendoll Homes LLC dba Washington Home Center. Neither party shall expend any funds whatsoever from the business account for anything other than a legitimate business expense.
- b. The family home and adjacent parcel shall be listed for sale. The Respondent shall propose 3 real estate listing agents; the Petitioner shall select one from those proposed by Respondent. The net proceeds of the sale shall be placed in a blocked account pending agreement of the parties or further court action.

Dated

12/2/11

Judge/Commissioner



JONATHON LACK

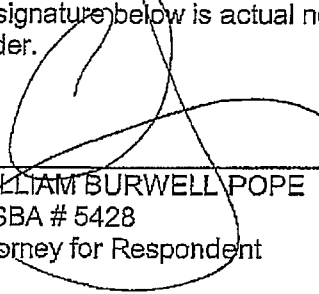
Petitioner or petitioner's attorney:  
A signature below is actual notice of this  
order.



---

MARGARET BROST  
WSBA # 20188  
Attorney for Petitioner

Respondent or respondent's attorney:  
A signature below is actual notice of this  
order.



---

WILLIAM BURWELL POPE  
WSBA # 5428  
Attorney for Respondent

APPENDIX D

OBJECTION TO PROPOSED FINDINGS OF  
FACT AND CONCLUSIONS OF LAW

BROST LAW, PC  
1800 COOPER POINT ROAD SW #18  
OLYMPIA, WASHINGTON 98502  
EMAIL@BROSTLAW.COM



☐ EXPEDITE (if filing within 5 court days of hearing)

☐ Hearing is set:

Date: \_\_\_\_\_

Time: \_\_\_\_\_

Judge/Calendar: \_\_\_\_\_

☒ No hearing set

*SUPERIOR COURT  
STATE OF WASHINGTON  
COUNTY OF THURSTON  
FAMILY AND JUVENILE COURT*

In re the Marriage of:

KAIN KLAUDE KIRKENDOLL,  
Petitioner,

and

KRISTIN ALENE KIRKENDOLL,  
Respondent.

NO. 14-3-00804-1

OBJECTION TO PROPOSED  
FINDINGS OF FACT AND  
CONCLUSIONS OF LAW  
(OPTIONAL USE)  
(MT)

Petitioner, Kain Kirkendoll, objects to the proposed Findings of Fact and Conclusions of Law based on the following:

1. With regard only to the Order on Motion for Stay of Judgment proposed by Respondent, it is acceptable with two changes. At page 1, line 25, after the words "previously entered its Findings of Fact and Conclusions of Law" the following should be added: "on July 24, 2015."

In addition, regarding paragraph 2 on page 2: at Petitioner's request during the stay

hearing the issue of reserved attorney's fees was clarified by the Court to include only post-trial matters. Language should be added to clarify this issue.

2. In addition to the Order, Respondent has submitted seven additional pages of Findings and Conclusions apparently intended to enhance Respondent's position relative to the already existing 13 pages of Findings and Conclusions entered over objection in this matter on July 24, 2015.

This is a procedural motion for the setting of a supersedeas bond. If any additional findings are necessary, they should be quite simple. Respondent now attempts to enter seven pages of new findings, the vast majority of which were not uttered by this Court but created by counsel, many of which are inconsistent with the existing findings, inconsistent with the evidence provided at trial, or are completely irrelevant to the requested stay.

While the trial court is authorized to make decisions regarding supersedeas, it is not permitted to modify or enhance its decision on the merits after an appeal has been filed without authorization from the appellate court, pursuant to RAP 7.2(e). Petitioner objects to all of the new Findings of Fact and Conclusions of Law except as they relate specifically to the stay. The transcript from the stay hearing of October 16, 2015 is attached as **Attachment A**. The findings of the Court were as follows: "I'm persuaded that she has sufficient need to receive the maintenance and property award. That cannot be mitigated by a supersedeas bond, and so I'm denying the request today." Petitioner objects to all of the findings beyond this statement as they modify or enhance the findings entered on July 24, 2015. The objections specifically listed below are in addition to this objection and have specific bases as noted.

Objections to Findings of Fact and Conclusions of Law

The following page and line references refer to the Findings of Fact and Conclusions of Law proposed by Respondent on October 26, 2015.

3. Page 4, line 3: "*He alleges that the Respondent does not need the funds ...*" Kain is not claiming that Kristin does not have a need. He states that she will not suffer hardship if the motion for stay is granted, while under the existing order of July 24, 2015, he is suffering extreme and severe hardship. Further, she has presented no evidence that she would suffer hardship.

4. Page 4, line 26: "*... after being financially dependent on the Petitioner for their thirty year relationship during which Kain Klaude Kirkendoll controlled all the finances.*" This proposed finding was neither found by the court, argued at trial or even mentioned at the stay hearing on October 16, 2015. It is inconsistent with trial testimony and is not part of the existing Findings of Fact. Respondent's testimony at trial was that she worked in the business until 2012, in equal capacity and that she was better able to manage the business than was Kain. There was no evidence that Kain controlled the finances during the marriage. It is not a finding made by this Court either after trial or at the stay hearing.

5. Page 5, line 13: "*Without those proceeds, her net award is a fraction of the net award received by her former husband even if the court were to employ Kain Klaude Kirkendoll's figures/values.*" This is demonstrably false and is not a finding made by this Court either after trial or at the stay hearing. Kristin was awarded 100% of both her own and Kain's retirement accounts. The retirement and other accounts awarded to Kristin, by her own

trial exhibit 22, total more than \$250,000. Using Kain's "figures/values" (trial exhibit 1) the remaining property awarded to Kristin has a value of \$43,800. Kain was awarded the business, with a value of \$100,000. The house with equity of \$23,200 (without considering sale costs) and the vacant land (which has now sold), yielded proceeds of \$10,000. The additional property awarded to him totaled \$5,419. Kain's total is, therefore, \$138,619, while Kristin's total is \$293,800. So "without those proceeds" (the retirement account of \$150,000 which is part of the subject of the motion for stay), Kristin's total would be \$143,089. This is without considering the \$378,000 maintenance that was awarded. The stay would leave Kristin with \$100,000 in retirement proceeds and monthly child support which is artificially high based on the court's erroneous setting of Kain's income. It would also leave Kristin with substantially more net income than Kain.

Kristin's attorney argued at the stay hearing (and her declaration implies) that it is her intent to cash out Kain's retirement account, the account at issue, incurring the penalties and taxes. If the stay is not granted Kain will have no recourse should the Court of Appeals reverse the trial court decision.

6. Page 5, line 17: *"Kain Klaude Kirkendoll's position with respect to his income is inconsistent with the evidence submitted at trial, including the testimony of the Respondent, Kain Klaude Kirkendoll's own expert, his most recent tax return and the Profit and Loss statements he prepared."* This statement is blatantly untrue. It is not a finding made by this Court either after trial or at the hearing for the stay. The business valuation expert (referred to by Respondent as Kain's expert - and the only expert to testify) did not testify in any way

contradictory to Kain's own testimony or his current position. Neither was there any evidence submitted suggesting that Kain's position regarding his income is incorrect. In fact, Kain's position regarding his income is undisputed. He does not deny that his taxable income is accurately reflected on his 2014 tax return. The difficulty is in the court's failure to recognize the mandatory deductions from that taxable income, despite expert testimony explaining the mandatory nature of these deductions. The deductions are not in dispute. They are a) taxes; b) mandatory payments owed on the original business Note; and c) monthly deductions from Kain's pay (federal tax, FICA, medicare). There was no evidence presented that these deductions were not paid and were not mandatory. With these deductions, Kain's income is exactly what he stated and the court ordered payments reduce that income to a negative figure of less than -\$1,400.

7. Page 5, line 26: *"Even with the retirement account, her net award is less than half the net assets available to the parties based on the evidence submitted at trial (even if the court were to assume that the Petitioner's business value was accurate and adopted Kain Kirkendoll's values and valuation)." As noted in Objection Number 5, above, this statement is demonstrably false by a simple review of the trial exhibits. It is not a finding made by this Court either after trial or at the stay hearing.*

8. Page 7, line 4: *"The duration of the maintenance award (which was longer than it might otherwise be), was the only way to compensate Ms. Peterson for her significant investment of time and energy in the business and family home which were awarded to Mr. Kirkendoll"*

This language contradicts this court's prior findings. The prior findings state *"The only way to realistically compensate the Respondent for her significant investment of time and energy in the business and family home is to award her substantial spousal maintenance."*

The court further stated in its prior findings: *"Maintenance should not terminate or be modified based on the Respondent's remarriage or cohabitation, because maintenance is also being utilized in this case to provide for a fair and equitable distribution of the assets and liabilities as well as to meet the needs of the respondent. For that reason, Kristin Kirkendoll should not be penalized nor should Kain Kirkendoll be financially rewarded, if the Respondent remarried or resided with another individual."*

As with its original findings in the letter opinion, the court's actual ruling at the stay hearing was limited and concise, it does not mention need as a basis for maintenance. Respondent drafted 13 pages of supplemental findings after trial despite the fact that the court did not issue the majority of the findings presented. (The findings were entered over objection). Once again, in this simple procedural motion, Respondent seeks to supplement and substantially alter the court's actual ruling with seven additional pages of findings designed to reflect her own position

10/27/2015

DATED



RANDOLPH FINNEY  
WSBA # 19893  
Attorney for Petitioner

14-3-00804-1  
Marriage of Kirkendoll & Kirkendoll

ATTACHMENT A

TRANSCRIPT OF STAY HEARING

BROST LAW, PC  
1800 COOPER POINT ROAD SW #18  
OLYMPIA, WASHINGTON 98502  
EMAIL@BROSTLAW.COM

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF THURSTON  
FAMILY AND JUVENILE COURT

In re the Matter of:

KAIN KIRKENDOLL,

Petitioner,

vs.

KRISTIN KIRKENDOLL,

Respondent.

THURSTON COUNTY  
NO. 14-3-00804-1

TRANSCRIPTION OF RECORDED PROCEEDINGS

BE IT REMEMBERED that on October 16, 2015,  
the above-entitled matter came on for hearing before the  
HONORABLE CHRIS WICKHAM, Judge of Thurston County  
Superior Court.

Transcribed by: Aurora Shackell, RMR CRR  
Official Court Reporter, CCR# 2439  
2000 Lakeridge Drive SW, Bldg No. 2  
Olympia, WA 98502  
(360) 786-5570  
shackea@co.thurston.wa.us



APPEARANCES

For the Petitioner:

RANDOLPH FINNEY  
Brost Law  
1800 Cooper Point Rd SW Ste 18  
Olympia, WA 98502-1103

For the Respondent:

WILLIAM B. POPE  
Pope, Houser & Barnes, PLLC  
1605 Cooper Point Rd NW  
Olympia, WA 98502-8325

1 (The following was transcribed from an audio recording.)

2 --o0o--

3 THE COURT: That leaves us with the Kirkendoll  
4 matter. And Mr. Finney, this is your motion.

5 MR. FINNEY: Yes, Your Honor. We're here on  
6 the Kirkendoll matter. This Court heard the trial  
7 the end of June. We're here on a motion for  
8 supersedeas under RAP 8.1(c)(3), which provides that  
9 where a party seeks a partial stay of judgment, the  
10 supersedeas amount shall be fixed at such sum as the  
11 trial court deems appropriate.

12 We're seeking a stay of the maintenance award in  
13 this case and one of the retirement accounts. The  
14 maintenance in this case was designated by this court  
15 as property distribution. The language of the  
16 Court's ruling was, "The only way to realistically  
17 compensate Ms. Kirkendoll for her significant  
18 investment of time and energy in the business and  
19 family home is to award her substantial spousal  
20 maintenance."

21 We are not suggesting that the stay of the  
22 maintenance award will not impact her, but with the  
23 child support amount and her own income, she would  
24 have approximately \$4,400 a month in income on which  
25 to live, which is very close to her household

1 expenses from her October 2014 financial declaration.  
2 Now, that isn't to say that her more recent  
3 financial declaration which drastically increases her  
4 household expenses is or is not accurate, but the  
5 point I'm making there is simply that Ms. Peterson  
6 will not be devastated by the imposition of the stay.  
7 Mr. Kirkendoll, on the other hand, would be. Now,  
8 a very brief recitation of the situation with  
9 Mr. Kirkendoll. At trial, this court found that his  
10 income was approximately \$140,000 per year, which is  
11 his taxable income from his 2014 tax return. It  
12 was -- that was not in dispute. It was also not in  
13 dispute that he has to pay \$48,000 per year from that  
14 amount for the note on the business. That amount has  
15 been paid since the inception of the business. It is  
16 an amount which is paid to the prior owner. Without  
17 paying it, the business would no longer belong to  
18 Mr. Kirkendoll.  
19 In addition, he had \$24,000 -- this is not in  
20 dispute either, \$24,000 of taxes on the business  
21 income that he also had to pay, bringing him down to  
22 \$78,000 gross income that is actually his usable  
23 income. From that, we take his federal income tax,  
24 his normal monthly deductions, federal income tax,  
25 FICA, Medicare, et cetera, leaving him with \$4,900

1 per month in income on which to live.

2 And while there is a dispute as to, I guess,  
3 whether the entire \$140,000 is available to him,  
4 those facts as delineated, the amounts that must be  
5 taken from his income, are not in dispute.

6 The amounts ordered at trial including maintenance  
7 and child support, or maintenance of \$3,000, child  
8 support of 1,140 and (inaudible) expenses that he's  
9 ordered to pay, total about \$1,400 more than that  
10 \$4,900 a month on which Mr. Kirkendoll lives. So  
11 those payments exceed his net income significantly.  
12 Even if he were to default on the debt payments, the  
13 mortgage, et cetera, just paying the maintenance and  
14 the child support would leave him with well under  
15 \$1,000 per month on which to live, about \$786 per  
16 month to live on, vastly below level of subsistence  
17 and vastly below the income that Ms. Kirkendoll would  
18 have with just the child support payment and her own  
19 income.

20 So we are requesting a stay. We put forward a  
21 stay to the court of appeals, a request for a stay,  
22 suggesting that the court of appeals institute --  
23 reinstate the temporary orders pending the appeal.  
24 That was denied because a bond was not proposed. We  
25 then refiled based on the Court's directive, the

1 Court of Appeals' directive, saying propose the bond  
2 under 8.1(b)(3). The Court of Appeals responded  
3 denying the motion without prejudice and saying that  
4 we should proceed to this Court first under  
5 8.1(c)(3). So that's what we're doing. We're asking  
6 for this Court to impose bond as the rules states in  
7 the amount --

8 THE COURT: I didn't see the request to  
9 reinstate temporary maintenance.

10 MR. FINNEY: That was the previous motion for  
11 stay presented to the Court of Appeals. When that  
12 was denied, our second motion was a completely  
13 different motion. The first motion was a request to  
14 stay the entire judgment on the dissolution and the  
15 reimposition of the temporary orders pending the  
16 appeal. The second motion was simply the same as  
17 this one, which is to stay the maintenance and one of  
18 the retirement accounts pending the appeal, and the  
19 rest of the orders would stay in place pending the  
20 appeal.

21 THE COURT: How can I stay the maintenance if  
22 she ends up with nothing while this case is in the  
23 Court of Appeals?

24 MR. FINNEY: She has other retirement  
25 accounts. She has her income.

1 THE COURT: But she had spousal maintenance up  
2 to the time of trial, and your suggestion is that now  
3 she should have none until the Court of Appeals is  
4 done?

5 MR. FINNEY: That is correct, Your Honor.

6 THE COURT: How is that reasonable?

7 MR. FINNEY: Well, we're suggesting that we  
8 post a bond that will cover --

9 THE COURT: How can you have a bond for  
10 maintenance if the bond is monthly payments to  
11 support somebody?

12 MR. FINNEY: Because maintenance is monthly  
13 payments to cover property distribution. Maintenance  
14 in this case is not -- this Court's very specific  
15 ruling was that it is --

16 THE COURT: Actually, you've misconstrued my  
17 comments. My point was that she is entitled to  
18 spousal maintenance. The comments about compensating  
19 her out of the business had to do with the duration,  
20 not the amount. It had to do with the length of  
21 maintenance, which is longer than the Court normally  
22 would have ordered, and that was a reflection on the  
23 fact that she was getting nothing out of the  
24 business. But at least for the initial months going  
25 forward, the spousal maintenance was based upon her

1       need.

2           And so if I stay that at this point, I'm  
3       essentially saying, well, I know you need this, but  
4       you're not getting it because there's an appeal going  
5       on. The supersedeas procedure, as I understand it,  
6       is intended to prevent the opposing party from being  
7       damaged in any way. I don't see how a bond prevents  
8       her from being damaged.

9           MR. FINNEY: Our position is that the bond  
10      prevents her from being damaged, because it is a  
11      property award. The Court related it very directly  
12      to --

13           THE COURT: I just said that if you're looking  
14      at this as a property award, you've misunderstood the  
15      comments in my letter, and I apologize for  
16      miscommunicating. But it was not my intention to  
17      make the spousal maintenance in this case strictly an  
18      award of property, so I don't see it that way.

19           MR. FINNEY: Understood, Your Honor. There  
20      was also the issue of the retirement account.

21           THE COURT: What's the problem with a bond on  
22      the retirement account, Mr. Pope?

23           MR. POPE: Well, when the retirement account,  
24      which she was actually going to liquidate, because it  
25      constitutes more than half of her net award, is that

1 retirement -- they picked out the one, they said only  
2 one, but it's the single largest asset she received.

3 THE COURT: Is she able to liquidate it?

4 MR. POPE: Well, yeah, she can. She has to  
5 pay a ten percent penalty, but, in reality, the ten  
6 percent penalty is cheaper than paying the 12 percent  
7 interest or more on some of these debts, including  
8 the attorney's fees she's now paying to two separate  
9 law firms. And does she want to do that? Heck, no.

10 THE COURT: Okay.

11 MR. POPE: But she owes a lot of money, and  
12 she wasn't awarded any additional fees, and -- enough  
13 on that issue.

14 THE COURT: All right. All right. I  
15 understand. So what about that? She's got debts she  
16 needs to pay, and the bond isn't going to help her  
17 with those debts.

18 MR. FINNEY: Well, Your Honor, her declaration  
19 states that she's paying the debts, most specifically  
20 the attorney's fees, out of the maintenance award.  
21 That was her complaint about not staying the  
22 maintenance award. Other than liquidating it for  
23 spending purposes now, I mean, the money is  
24 protected. The purpose of the bond is to protect  
25 that money. No one -- we're not is suggesting that



1 the money be taken out or used, and we're willing to  
2 put up a bond protecting -- whatever you would call  
3 her inability to access that. And so if that harms  
4 her in some way, we're willing to put up a bond such  
5 that she'll have additional money based on whatever  
6 that harm would be.

7 THE COURT: Well, if you're successful in the  
8 Court of Appeals, I assume that there will be a  
9 different division of property. I can't imagine her  
10 getting less than she was awarded at trial in this  
11 case, and so I assume she would still end up with the  
12 retirement account. I don't know that --

13 MR. FINNEY: We would be arguing that she  
14 shouldn't because we -- you know, respectfully, Your  
15 Honor, we disagree that the property award was  
16 equitable.

17 THE COURT: Okay. All right. Well, I'm  
18 persuaded that she has sufficient need to receive the  
19 maintenance and the property award. That cannot be  
20 mitigated by a supersedeas bond, and so I'm prepared  
21 to deny the request today.

22 MR. FINNEY: Thank you, Your Honor.

23 MR. POPE: She requested that she be awarded  
24 her fees and costs on this, Your Honor. And this is  
25 three very expensive motions since you entered the

1 final papers. We started this off with their little  
2 present, 253 pages three days after the decree was  
3 entered. Their emergency stay, thank goodness, was  
4 denied, but they gave us ten whole days to respond  
5 again, which again was denied. And then they filed  
6 another motion, which was denied without prejudice.  
7 And here we are, the fourth time.

8 MR. FINNEY: The Court of Appeals handled the  
9 first two motions, including the request for  
10 attorney's fees, which it did not grant. Those  
11 hearings are not before the Court. This hearing, I  
12 believe, was brought in good faith, and I believe  
13 that the request is reasonable.

14 THE COURT: So the basis for the request,  
15 Mr. Pope?

16 MR. POPE: Well, goes to both need versus  
17 ability to pay, but it goes back to her original  
18 request of frivolous, aggressive litigation. I don't  
19 know how else you can say it in this case. I mean,  
20 the best-case scenario they can argue, well, we made  
21 two mistakes in the Court of Appeals, and the Court  
22 of Appeals corrected it twice, and the third time  
23 they told us where to go, so we're trying again.  
24 This -- she has had to respond to all of these, and  
25 it has been, and not just with me, with a major

1       appellate firm --

2               MR. FINNEY: Your Honor, the Court of Appeals  
3       motions are not before the court. And with regard to  
4       need and ability to pay, as has been stated, we have  
5       no choice but to be aggressive. Mr. Kirkendoll is  
6       left with less -- significantly less than zero  
7       dollars on which to live. Ms. Kirkendoll with the  
8       maintenance has, as this court is again ruling,  
9       nearly \$7,000 per month after taxes on which to live  
10      while Mr. Kirkendoll has \$1,400 in the negative. So  
11      need and ability to pay clearly favors  
12      Mr. Kirkendoll.

13             And this is an entirely reasonable motion. The  
14      Court of Appeals, you read the rulings, did not find  
15      that the motion was ill-founded in any way  
16      whatsoever. It did not grant attorney's fees even  
17      though they were requested.

18             THE COURT: You know, I'm cautious about  
19      granting fees this morning, but I am sensitive to the  
20      possible need for the Court to revisit the  
21      intransigence issue. And I think what I'm going to  
22      do this morning is just reserve the issue of fees,  
23      and, at some point at the end of this proceeding,  
24      counsel can renew his request.

25             MR. POPE: Thank you very much, Your Honor.

1 MR. FINNEY: You're reserving fees for the  
2 post-dissolution matters?  
3 THE COURT: Yes.  
4 MR. FINNEY: Thank you. Can we draft an order  
5 very quickly?  
6 THE COURT: Sure.  
7 MR. FINNEY: Thank you, Your Honor.  
8 MR. POPE: Thank you, Your Honor. Would Your  
9 Honor like findings to go with this for the Court of  
10 Appeals?  
11 THE COURT: It's your call.  
12 MR. POPE: I would prefer to do this simply  
13 because --  
14 THE COURT: All right. I have a calendar on  
15 the 28th. You can present them on the 28th at 1:30.  
16 MR. FINNEY: I would like to write this up  
17 today, Your Honor. I'd like to proceed.  
18 THE COURT: He's got a right to findings if he  
19 wants them.  
20 MR. FINNEY: All right, Your Honor.  
21 THE COURT: He's also got a right to time for  
22 presentation.  
23 MR. POPE: Thank you, Your Honor.  
24 THE COURT: So let's set this over to the 28th  
25 at 1:30.

1 MR. POPE: Is that a Friday?  
2 THE COURT: It's a Wednesday. It's a special  
3 calendar.  
4 MR. POPE: Okay. Thank you, Your Honor.  
5 MR. FINNEY: Is that 1:30?  
6 THE COURT: Yeah. And we'll confirm it.  
7 MR. POPE: Thank you, Your Honor.  
8 MR. FINNEY: Thank you, Your Honor.  
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CERTIFICATE OF REPORTER

STATE OF WASHINGTON        )  
                                  ) ss.  
COUNTY OF THURSTON        )

I, AURORA J. SHACKELL, CCR, Official  
Reporter of the Superior Court of the State of Washington  
in and for the County of Thurston do hereby certify:

1. I received the electronic recording from the trial  
court conducting the hearing;
2. This transcript is a true and correct record of the  
proceedings to the best of my ability, except for any  
changes made by the trial judge reviewing the transcript;
3. I am in no way related to or employed by any party in  
this matter, nor any counsel in the matter; and
4. I have no financial interest in the litigation.

Dated this the 27th day of October, 2015.

AURORA J. SHACKELL, RMR CRR  
Official Court Reporter  
CCR No. 2439

APPENDIX E

FINDINGS OF FACT AND CONCLUSIONS OF  
LAW

BROST LAW, PC  
1800 COOPER POINT ROAD SW #18  
OLYMPIA, WASHINGTON 98502  
EMAIL@BROSTLAW.COM

☐ EXPEDITE

☐ Hearing is set: ☐ None

Date: 10/28/15

Time: 1:30 p.m. special set

Judge Christopher Wickham

SUPERIOR COURT OF WASHINGTON  
COUNTY OF THURSTON  
FAMILY & JUVENILE COURT

In re the Marriage of:

KAIN KLAUDE KIRKENDOLL,

Petitioner,

and

KRISTIN ALENE KIRKENDOLL

(nka Kristin Alene Peterson),

Respondent.

NO. 14-3-00804-1

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW  
(FNFCL)

This matter came on regularly before the Honorable Judge Christopher Wickham on October 16, 2015, pursuant to Kain Klaude Kirkendoll's Motion for Stay of Judgment. The Petitioner appeared by and through his attorney Randolph Finney of BROST LAW, PC. The Respondent appeared in person and with her attorney, William B. Pope of POPE, HOUSER & BARNES, PLLC. The court having reviewed the records and files herein, having heard the statements of counsel, and in all things being fully advised, now makes and enters the following:



1  
2 FINDINGS OF FACT

3 *I. Background*

4 The court entered its written trial ruling on July 6, 2015. Findings of Fact,  
5 Conclusions of Law and Decree of Dissolution of Marriage, together with an Order of Child  
6 Support Final and Parenting Plan Final were entered on July 24, 2015. On July 27, 2015,  
7 Kain Klaude Kirkendoll filed a Notice of Appeal to the Court of Appeals. At that time, he  
8 also filed an Emergency Motion to Stay Enforcement of Final Dissolution Orders Pending  
9 Appeal, Kain Kirkendoll's Application with Supporting Declaration to Invoke RAP 17.4(B)  
10 Emergency Motion Procedure for Consideration of Motion to Stay Enforcement of Final  
11 Dissolution Orders Pending Appeal, and Appendices to Motion to Stay Enforcement of Final  
12 Dissolution Order Pending Appeal.

13  
14  
15 On July 28, 2015, Court of Appeals Commissioner Aurora R. Bearse entered an order  
16 denying the emergency stay and requesting an answer from Kristin Kirkendoll (now  
17 Peterson) to the motion to stay within ten days.

18  
19 On August 7, 2015, Respondent Kristin Kirkendoll's Answer to Appellant Kain  
20 Kirkendoll's Emergency Motion to Stay Enforcement of Final Dissolution Orders Pending  
21 Appeal was filed.

22 On August 11, 2015, Court of Appeals Commissioner Aurora R. Bearse entered a  
23 Ruling Denying Motion to Stay.

24  
25 On August 17, 2015, Kain Klaude Kirkendoll filed a Motion for Stay Upon Posting  
26 of Bond together with Appendices to Motion to Stay Enforcement of Final Dissolution Order  
27 Pending Appeal.

1  
2 On September 29, 2015, Court of Appeals Commissioner Aurora R. Bearse entered  
3 a Ruling Denying Motion to Stay which provided: "In the event the father wishes to  
4 supersede a portion of the judgment, he may do so in the trial court pursuant to RAP  
5 8.1(b)(1) and RAP 8.1(c)(3)."  
6

7 On October 8, 2015, Kain Klaude Kirkendoll filed his Motion for Stay of Judgment  
8 in this court.

9 Kain Klaude Kirkendoll's first motion to stay that was filed with the Court of  
10 Appeals requested that the Court of Appeals reinstate the Temporary Parenting Plan pending  
11 appeal and reinstate the levels of maintenance and child support that were in existence prior  
12 to trial. That motion was denied.  
13

14 Kain Klaude Kirkendoll then filed his second motion with the Court of Appeals.  
15 That motion "significantly limited the requested stay of relief." In the Motion for Stay Upon  
16 Posting Bond he asked the court to stay the monthly maintenance obligation and to stay  
17 Respondent's right to draw on one of the Edward Jones traditional IRA accounts pending  
18 appeal. He abandoned the issues surrounding the Parenting Plan. That motion was denied.  
19

20 The pending Motion for Stay of Judgment requests the court to stay the maintenance  
21 award, maintain the current child support obligation, and to stay the Respondent's ability to  
22 utilize the Edward Jones retirement account standing in the name of Kain Klaude Kirkendoll  
23 which was awarded to her Kristin Kirkendoll (now Peterson) in the Decree of Dissolution.  
24

## 25 *II. Parties' Positions*

26 In his first motion Mr. Kirkendoll asked that the maintenance be reduced to the level  
27 that existed prior to trial. In his current motion he asks that maintenance be stayed altogether  
28 and that he be relieved of that responsibility pending his appeal. Kain Klaude Kirkendoll

1  
2 alleges that he can not afford maintenance. He again alleges his income is limited to the  
3 \$6,500 per month salary he receives from the business. He alleges that the Respondent does  
4 not need the funds because the level of child support that was ordered, together with her  
5 income, satisfies her household expenses as evidenced by the financial declaration she filed  
6 on October 31, 2014, at the commencement of the dissolution of marriage proceedings. Kain  
7 Klaude Kirkendoll alleges that the existing order does not provide any funds for him to meet  
8 his own needs or to maintain the business. Without a stay, Mr. Kirkendoll alleges his only  
9 two options will be to default on the debt payments or to default on the maintenance and  
10 child support payments. Kain Klaude Kirkendoll further alleges that the maintenance award  
11 was not based on need and the ability to pay, but rather constituted a property award. Kain  
12 Klaude Kirkendoll relies on a portion of the June 30, 2015 opinion letter which stated in  
13 part: "The only way to realistically compensate Ms. Kirkendoll for her significant investment  
14 of time and energy in the business and family home is to award her substantial maintenance."

15  
16  
17 Kain Klaude Kirkendoll requested the court to stay Kristin Kirkendoll's (now  
18 Peterson) right to the retirement account awarded to her which was standing in the name of  
19 her former husband, claiming that it would not be available to her under any circumstances  
20 at this time without adverse tax consequences.

21  
22 Kristin Kirkendoll (now Peterson) argues that the granting of the Petitioner's motion  
23 would cause significant economic hardship to her and to their daughter. The budget relied  
24 on by Kain Klaude Kirkendoll in his argument was one Kristin Kirkendoll (now Peterson)  
25 submitted at the commencement of the case ~~after being financially dependent on the~~  
26 ~~Petitioner for their thirty-year relationship during which Kain Klaude Kirkendoll controlled~~  
27 ~~all the finances.~~ Her current budget was testified to at the time of trial and became a trial  
28

1  
2 exhibit. Her expenses were not challenged by Mr. Kirkendoll at trial and her financial  
3 declaration was admitted without objection or challenge. Kristin Kirkendoll's (now  
4 Peterson) household expenses as supported by her unrefuted exhibit and testimony, totaled  
5 \$7,070.90 per month. That balance, however, did not include the substantial attorney fees  
6 and costs she incurred in the action, which are still in excess of \$50,000. Kristin Kirkendoll  
7 (now Peterson) claims that her former husband's income is significantly higher than the  
8 \$6,500 salary he sets for himself and that figure does not include the benefits he pays for  
9 himself through the business or his draws. She points out that the retirement account  
10 awarded to her which Kain Klaude Kirkendoll asked to be stayed, constitutes the single  
11 largest asset she received in the court's award. ~~Without those proceeds, her net award is a~~  
12 ~~fraction of the net award received by her former husband even if the court were to employ~~  
13 ~~Kain Klaude Kirkendoll's figures/values.~~

14  
15  
16 ~~Kain Klaude Kirkendoll's position with respect to his income is inconsistent with the~~  
17 ~~evidence submitted at trial, including the testimony of the Respondent, Kain Klaude~~  
18 ~~Kirkendoll's own expert, his most recent tax return, and the Profit and Loss statements he~~  
19 ~~prepared.~~ Kristin Kirkendoll's income, expenses, and the expenses of the household  
20 (including the parties' daughter), were unrefuted. There is no question that she has a need.  
21 There is no question that to eliminate the award of maintenance or to reduce it would create  
22 economic hardship for the Respondent and the parties' daughter. There is no evidence  
23 submitted to support, much less compel the court to stay the award of the retirement account  
24 to the Respondent. ~~Even with the retirement account, her net award is less than half the net~~  
25 ~~assets available to the parties based on the evidence submitted at trial (even if the court were~~  
26  
27  
28

1  
2 ~~to assume that the Petitioner's business value was accurate and adopted Kain Kirkendoll's~~  
3 values and valuation).

C ~ 4 The Respondent requests an award of fees and costs that she incurred in addressing  
5 the Petitioner's motions. She had requested an award of fees and costs at the trial level  
6 which was denied in part because of the maintenance that was ordered. That maintenance  
7 award reduced (but did not eliminate) the need on Respondent's part and if paid, would  
8 reduce (but not eliminate) the Petitioner's ability to pay based on the evidence presented at  
9 trial. The Petitioner had also requested an award of fees based on her former husband's  
10 intransigence. The court following trial, did not find that the case rose to the level of the  
11 actions referenced in *Matson and Matson*, 95 Wn.App. 592 (1999) and *Marriage of*  
12 *Greenlee*, 65 Wn.App. 703 (1992), and the court was cautious about assigning blame or  
13 imposing punishment for failure to agree. The court finds, however, that issue may be  
14 revisited following the conclusion of the appellate process if the issue of fees is not  
15 addressed by the Court of Appeals. From the foregoing Findings of Fact, the court now  
16 makes and enters the following

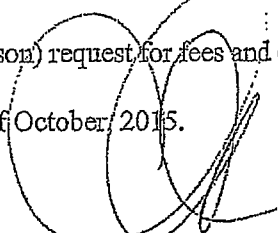
#### 20 CONCLUSIONS OF LAW

21 1. Kain Klande Kirkendoll's Motion for Stay should be denied. The evidence  
22 presented, like the evidence at the time of trial, does not support his position. Statutory and  
23 case law supports the award of maintenance. The maintenance amount was based on need  
24 versus ability to pay. The maintenance duration took into consideration the property aspects  
25 of the case in that there were no other significant assets to award to Kristin Kirkendoll (now  
26 Peterson) to provide for a fair and equitable distribution in this long term marriage. The  
27 single largest asset under either party's view of this case was clearly the business, which was  
28

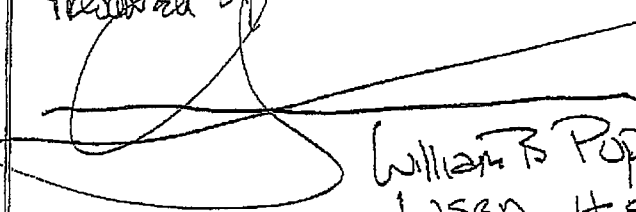
1  
2 awarded in its entirety to Kain Klaude Kirkendoll. The monthly amount was based on  
3 "need" and "the ability to pay," together with the other statutory and case law criteria. The  
4 duration of the maintenance award (which was longer than it might otherwise be), was the  
5 only way to compensate Ms. Peterson for her significant investment of time and energy in  
6 the business and family home which were awarded to Mr. Kirkendoll.  
7

8 2. Kristin Kirkendoll's (now Peterson) request for fees and costs shall be reserved.

9 DONE IN OPEN COURT this 28 day of October 2015.  
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JUDGE CHRISTOPHER WICKHAM

Presented by:

  
William R. Pope  
WSBA #54288

FILED  
COURT OF APPEALS  
DIVISION II  
2015 DEC 12 AM 3:10  
STATE OF WASHINGTON  
BY DM  
DEPUTY

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

KAIN KLAUDE KIRKENDOLL,  
Appellant,  
and  
KRISTIN ALENE KIRKENDOLL,  
Respondent.

NO. 47832-3-II

RETURN OF SERVICE  
(OPTIONAL USE)  
(RTS)

I DECLARE:

1. I am over the age of 18 years, and I am not a party to this action.
2. I served the following documents to WILLIAM BURWELL POPE & SIDNEY TRIBE:  
  
Brief of Appellant
3. The date, time and place of service were (if by mail refer to Paragraph 4 below):  
  
Does not apply.

4. Service was made:

By mailing a copy via first class mail on December 11, 2015.

By delivery through electronic mail to the person named in paragraph 2 above.

Email directed to: attorneys@wbpopelawfirm.com and sidney@tal-fitzlaw.com  
on December 11, 2015.

5. Service of Notice on Dependent of a Person in Military Service.

Does not apply.

6. Other:

Does not apply.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF  
WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Olympia, WA

City and State

12/11/2015

Date

KRISTINA HAUGEN

Print or Type Name

*Kristina Haugen*

Signature